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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 367

G. C. COOPER, BERNARD COOPER, AND ELIZABETH MAULDING, NEE COOPER,
Petitioners,

vs.

THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

LESLIE L. CONNER
CHARLES HILLS JOHNS
O. A. CARGILL, JR.
JAMES M. LITTLE
Attorneys for Petitioners

Of Counsel:
CONNER, LITTLE & CONNER
630-636 Hightower Building
Oklahoma City, Oklahoma

E. L. MENDENHALL, INC., 916 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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THE CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a Writ of Certiorari issue to the Supreme Court of the State of Oklahoma to review the opinion and judgment of the Supreme Court of the State of Oklahoma, of January 25, 1966, as amended by order of the Supreme Court of Oklahoma of March 22, 1960. Petition for Rehearing filed February 24, 1966, denied

March 22, 1966, Second Petition for Rehearing filed March 28, 1966, denied April 19, 1966

OPINION BELOW

Findings of fact, conclusions of law, and judgment of the trial court are printed as Appendix "A". The opinion of the Supreme Court of the State of Oklahoma is printed as Appendix "B". Order dated March 22, 1966, amending opinion (Appendix "B") is printed as Appendix "C", as they are not officially reported

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on January 25, 1966 (Appendix "B"). A Petition for Rehearing was filed February 24, 1966 and denied March 22, 1966. A second Petition for Rehearing was filed March 28, 1966 and was denied April 19, 1966. An Order Amending the Opinion was entered March 22, 1966 (Appendix "C"). The jurisdiction of this court is invoked under Title 28, U.S.C.A., Section 1257 (2) (3) and Rule 19 of the Supreme Court of the United States. The Petitioners have exhausted all of their state court remedies. The constitutional and federal questions were raised in the petition in the trial court (R. Vol. 1, pp. 9, 35) and in the Supreme Court of Oklahoma.

QUESTIONS PRESENTED

1. Where a City, by condemnation decree, has taken private property, involuntarily, where at all times there was no public necessity, and such City knows there was no public necessity, is such condemnation decree res judicata in a timely action by landowners to set aside such decree upon ground of jurisdictional fraud?

2. Whether as applied to these petitioners the opinion and judgment of the Supreme Court of the State of Oklahoma violates their rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States, in that it is a taking of their private property for non-public use without due process of law.

3. Whether as applied to these petitioners, the laws of the State of Oklahoma as applied in this case, by the Supreme Court of Oklahoma violates the 5th and 14th Amendments to the Constitution of the United States; Article 2, Section 23; Article 2, Section 24; Article 4, Section 1; Article 2, Section 1 and Section 7 of the Constitution of the State of Oklahoma.

4. Where the recorded facts, and findings of fact of the trial court, show that Oklahoma City (Respondent) in 1941 condemned the property involved alleging a "public necessity," but at that time (1941) Respondent City knew no "public necessity" existed, does a decision of the Supreme Court of Oklahoma, in an action, timely brought by the landowners (Petitioners) to set aside the original condemnation decree for jurisdictional fraud, adjudicating the original condemnation decree res judicata notwithstanding such jurisdictional fraud offend and violate the rights of petitioners under the 5th and 14th Amendments to the Constitution of the United States and deprive petitioners of their property without due process of law.

5. May a court of competent jurisdiction assume jurisdiction over a case seeking to set aside a prior condemnation proceeding where an essential element of the court's jurisdiction was lacking from the beginning.

6. May the original condemnees (Petitioners) maintain an independent action to set aside a prior judgment after the original condemnor (Respondent) had declared

by an official declaration that the property condemned for a special purpose is no longer needed as a public necessity and any public necessity is no longer in existence.

CONSTITUTION INVOLVED

The Constitution of the State of Oklahoma; Article 2, Section 1—

> "The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 7—

> "No person shall be deprived of * * * * property, without due proces of law."

Article 2, Section 23—

> "No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law."

Article 2, Section 24—

> "Private property shall not be taken or damaged for public use without just compensation."

Constitution of the United States, 5th Amendment—

> "No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment—

> "Nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT

In July of 1941, the City of Oklahoma City, Oklahoma, determined to locate and construct a "Water reservoir" originally denominated "Bluff Creek Reservoir" (R. Vol. 2, pp. 3-6). This water reservoir is now named Lake Hefner.

This body of water is not a lake, it is merely an earthen reservoir built to receive and contain water and is filled primarily by a canal which diverts water from another reservoir and the North Canadian River. The water received and retained in this reservoir (Lake Hefner) is a water supply for the City of Oklahoma City.

The water coming into this reservoir from the North Canadian River in the inception is polluted water. By proper scientific processes this polluted water is purified, filtrated, and processed into clear, fresh, unadulterated and unpolluted drinking water for use by the City of Oklahoma City and its environs, and for other uses of the citizenship of Oklahoma City and other communities.

The uncontradicted fact that surface drainage and surface waters from the property surrounding the reservoir is of no significance whatsoever, insofar as the pollution of the waters is concerned (R. Vol. 1, p. 401) is of paramount importance in this case.

In the original condemnation action, Oklahoma City sought to condemn the property involved solely under the allegations that it was necessary for Oklahoma City to have and acquire this property in order to protect this reservoir from possible pollution by surface waters which might flow across the lands involved. It has been conceded and it is a fact that the only possible basis of any public necessity for the City to acquire these lands in-

volved of acquiring the same in order that the City could prevent possible pollution from surface waters flowing over the lands involved (R. Vol. 1, p. 29). A necessity which in fact has never existed. The respondent in no way contends either in the original condemnation proceedings, or in this action, that it was, or is, necessary for Oklahoma City to have this land for any public reservoir purposes.

The uncontradicted facts in this case reflect that the lands involved in this action are vacant farm lands with no improvements (R. Vol. 1, p. 400). Since the original condemnation action in 1941, Oklahoma City has done nothing whatsoever with reference to the lands involved, and these lands have lain dormant and vacant at all times exactly the same as they were when the original condemnation action was instituted under the fraudulent allegations of Respondent.

The lands involved in this action are contiguous to a tract of land known as the "Stevens" tract (R. Vol. 2, p. 44, Pltfs. Ex. 36), which was not condemned by the Respondent. The Stevens tract had improvements consisting of a house, a barnyard, a chicken yard, and two cess pools at the time the original condemnation proceeding was filed in 1941. The evidence shows conclusively that any possible pollution from any surface drainage into Lake Hefner would be far, far greater from the surface waters emanating from the Stevens tract, which had located thereupon the barnyard, the chicken yard, the structures, and the cess pools. The drainage from the lands involved and the drainage from the Stevens tract is identical—that is, the surface waters from the lands involved and from the Stevens tract flow and drain in identically the same manner to and into Lake Hefner. The drainage of surface water is of no consequence in so far as protecting the water from pollution.

In March of 1960, the Respondent City of Oklahoma City enacted a Municipal Ordinance declaring that this property involved in this proceeding was in no way necessary or needed for reservoir or other public purposes, and should be sold by the city at public auction (R. Vol. 2, pp. 7-8).

When this action on the part of the City of Oklahoma City was taken, in March, 1960, which was the first time these facts were discovered by the petitioners in this case, this present action was instituted, which resulted in a judgment of the trial court in favor of the petitioners. The action was timely brought, and was brought within a few days after plaintiffs discovered the colossal fraud perpetrated by Oklahoma City in the original condemnation proceeding.

At about the same time it was discovered by these Petitioners that the engineer and other public officers of the respondent had these facts within their knowledge and control since the original condemnation in 1941 (R. Vol. 1, pp. 165-166).

The Respondent knew, and the undisputed evidence in this case shows that surface waters draining from and over property with buildings, barnyards, chicken yards, and cess pools such as the Stevens tract present a far greater threat and possibility of pollution from surface waters than does property which is vacant and has *no* buildings, barnyards, chicken yards, or cess pools. Inasmuch as the property involved in this action has the same identical drainage pattern, and was vacant property, and contiguous to the Stevens tract, is conclusive that the taking of the land involved in this action was not necessary.

The Respondent concealed and withheld these facts fron. these landowner-plaintiffs, and concealed and withheld these facts from the court in the original condemnation proceeding filed July 24, 1941 (R. Vol. 2, pp. 47-83). This constituted a serious mis-representation and breach of the solemn trust imposed upon Oklahoma City when it acquired its power of eminent domain from the State of Oklahoma. The City concealed the knowledge that it had, and that it alone had, and defrauded these landowner-petitioners and perpetrated a fraud upon the court when it did not make a full and complete disclosure of all the facts in the original condemnation proceeding.

This cause of action, of course, primarily involves the rights of petitioner landowners in this case. But the principles involved in this action involve and affect every citizen of the United States. The power of eminent domain is a necessary power possessed by the sovereignty of the State of Oklahoma. This power can and should be delegated to municipalities and other condemning authorities in order that the governmental functions of our great State can be properly carried out. But, with this power of eminent domain so possessed by the State of Oklahoma, and so delegated to municipalities, there is coupled with the delegation of such power a sacred public trust imposed upon the municipality obtaining this power of eminent domain to the effect that it can only be exercised in accordance with the Constitution of the State of Oklahoma, the Constitution of the United States, and in accordance with the basic law of our land. The aerial photographs and maps showing the location of the land involved are in the record (R. Vol. 2, pp. 2-44).

STATEMENT OF THE CASE

On March 31, 1960, the petitioners commenced an action in the District Court of Oklahoma County to vacate, set aside, and annul the 1941 condemnation proceedings in so far as the same affected the 24.61 acres specifically described. The 24.61 acres described in the petitioners' petition and the 23.85 acres described in the city's resolution March 22, 1960 (R. Vol. 2, pp. 7-8) constitutes the same tract of land and will be referred to as the 24.61 acre tract. The petitioners stated as grounds for vacation of that portion of the 1941 condemnation proceedings wherein the city acquired the 24.61 acres that the same were not needed for reservoir purpose or other public purposes and that extrinsic legal fraud was perpetrated by the city in taking said property by eminent domain proceedings. The trial court found that the respondent city by their action and deeds concealed and withheld certain facts which constitute legal resulting, constructive and extrinsic fraud and bad faith and caused the court in the original condemnation proceeding to abuse its discretion in so far as the 24.61 acre tract is concerned (R. Vol. 2, p. 181). The trial court further found that the respondent city failed to disclose to the trial court in the 1941 eminent domain proceedings that it was not necessary for the city to acquire the 24.61 acres in order to protect the water reservoir from possible pollution, in as much as the city at the time of such taking was constantly aware of the fact that it could adequately protect the reservoir from possible pollution emanating from surface water from the 24.61 acres without the taking and acquisition thereof (R. Vol. 1, pp. 398-411).

REASONS FOR GRANTING THE WRIT

1

The decision of the Supreme Court of Oklahoma in this case should not be left undisturbed and it is imperative that this court correct the errors involved for several reasons, any of which qualify for review by this court, and when taken together show a definite need for the court's attention.

2.

The decision of the Supreme Court in this case allowing the City of Oklahoma City to condemn land in 1941 when the public necessity did not exist in the original condemnation proceeding and allowing the City of Oklahoma City to declare the property surplus and sell it at economic profit in 1960 is repugnant to and in conflict with the 5th and 14th Amendments to the Constitution of the United States.

3.

This decision is repugnant to and in conflict with prior decisions of the Supreme Court of the United States.

4.

The sale of property acquired by condemnation for an alleged public purpose, when the special purpose did not exist from the inception of the original condemnation violates the 5th and 14th Amendments to the Constitution of the United States and is repugnant to and in conflict with Article 2, Section 7, Section 23 and Section 24 of the Constitution of the State of Oklahoma. The denial of the former landowners' right to file an independent action to set aside a condemnation proceeding where the public necessity although declared to exist by the legislature and

the condemning authority does not in fact exist violated and is repugnant to Article 2, Section 7 of the Constitution of the State of Oklahoma and the 5th and 14th Amendments to the Constitution of the United States.

5

That the vast number of governmental agencies clothed with the authority to condemn land under the power of eminent domain requires this court to take jurisdiction and to reconcile the conflict that exists in the decisions of the courts of the United States and the several states.

ARGUMENT AND BRIEF OF AUTHORITIES

The questions presented will be grouped and argued under the following three propositions:

PROPOSITION ONE

Where a City, by Condemnation Decree, Has Taken Private Property, Involuntarily, Where at All Times There Was No Public Necessity, and Such City Knows There Was No Public Necessity, Is Such Condemnation Decree Res Judicata in a Timely Action by Landowners to Set Aside Such Decree upon Ground of Jurisdictional Fraud?

The subject of eminent domain has been presented to and examined by the courts of our country for many years. It involves the inherent right of the sovereignty to take and acquire private property for public use and many decisions can be found in our courts dealing with this subject. Legislative acts have been enacted by several states and by the Congress of the United States delegating the power to condemn property to many different governmental agencies. The Constitution of the United States of America and the Constitution of the State of Oklahoma both contain provisions applicable to the right of the sovereignty to acquire private property by condemnation.

The Constitution of the State of Oklahoma is clear, and unambiguous. Article 2, Section 21, Oklahoma Constitution, provides in part as follows:

> "No private property shall be taken or damaged for private use."

Article 2, Section 24, Constitution of Oklahoma, provides in part as follows:

> "In all cases of condemnation of private property for public or private use the determination of the character of the use shall be a judicial question."

The Legislature of the State of Oklahoma delegated to municipalities within the State of Oklahoma certain powers of eminent domain pertaining to water reservoirs. The nature of this power so delegated by the Legislature to the municipalities within the State of Oklahoma was, of necessity, delegated pursuant to the expressed provisions to the Constitution of the State of Oklahoma quoted above. This delegation of such power is the only provision under which any municipality possesses any right whatsoever to seek to acquire private property in eminent domain proceedings pertaining to water reservoirs.

It is conceded herein the only possible necessity to take the 24.61 acres involved by eminent domain was that it was necessary for Oklahoma City to acquire this 24.61 acres in order to protect Lake Hefner from pollution from surface drainage over said land (R. Vol. 1, pp. 399, 400).

This suit was instituted to vacate and set aside the condemnation decree alleging jurisdictional fraud, and was a timely proper action under the facts and the law of Oklahoma as determined by the Supreme Court of Oklahoma in decisions previous to the opinion herein.

The evidence in the record, and the findings of fact and conclusions of law of the trial court reflect that there was no public necessity of any nature or kind which required the taking and acquiring of said 24.61 acres for any public purpose, at the time of the institution of the original Condemnation suit by Oklahoma City, or at any time thereafter, *and that Oklahoma City knew there was no public necessity,* and concealed such knowledge from the Court, and actually misrepresented the jurisdictional question of public necessity to the Court by seeking to take title to said 24.61 acres by condemnation when said condemnor (Oklahoma City) knew no public necessity existed (R. Vol. 1, pp. 401, 402).

The opinion and judgment of the Supreme Court of Oklahoma herein has adjudicated that notwithstanding such jurisdictional defect in the original condemnation decree, i.e. no public necessity whatsoever at any time, and condemnor's knowledge of such lack of jurisdiction, the land owners (Petitioners herein) could not maintain a timely action brought within the time of the discovery of such jurisdictional fraud under the Oklahoma Statute, for the reason that no appeal was perfected from said original condemnation judgment and decree, notwithstanding the overwhelming proof of such jurisdictional fraud, and such findings of fact and conclusions of law by the Trial Court herein.

The opinion and judgment of the Supreme Court of Oklahoma upholding a Decree of a Court condemning property for a non-public use or purpose, when, as here, properly and timely challenged for lack of jurisdiction, deprived Petitioners of their property without due process of law contrary to the 5th and 14th Amendments to the United States Constitution.

Condemnation of property for a non-public use is a denial of due process of law.

The petitioners will concede that it is a legislative determination as to whether a particular necessity exists for which the municipality or other agency may condemn property for public use. However, the petitioners strenuously urge that the question of whether or not a public necessity actually exists in a certain case as the one at bar is a judicial question and the lack of the actual existence of any public necessity deprives the court of its jurisdiction to condemn the property and the original owners may raise such jurisdictional fraud within two (2) years of the discovery thereof.

The Supreme Court of the State of Oklahoma in the case of *McIntosh* v. *Holtgrave,* 191 Pac. 739, held:

> "A domestic judgment may be attacked in three (3) ways: (a) by a direct attack which is an attempt to avoid or correct in some manner provided by law, (b) a collateral attack which is an attempt to avoid, defeat, or evade or deny its force or effect in some incidental proceeding not provided by law for the express purpose of attacking it, (c) by equitable proceeding to set aside said judgment for fraud practiced by the successful party, said fraud inducing or entering into such order or judgment, where such fraud is extrinsic to the issues in the proceeding attacked, and especially where the court has been imposed upon by such fraud."

It is clear under the facts as found to exist by the trial court in the findings of fact, Appendix "A", the Respondent withheld certain essential information from the court thereby perpetrating a fraud upon the petitioners in this case and upon the District Court of Oklahoma County, Oklahoma, when the City of Oklahoma City sought to acquire the lands involved for non-public use by con-

demnation in eminent domain. The allegations and representations of the City of Oklahoma City to secure the lands involved for public purposes stated that the land involved in this suit was necessary for the protection from pollution of the reservoir which was about to be constructed. The City knew and had facts in its control at the time that the land included in the condemnation proceedings was not necessary for the public use (R. Vol. 1, pp. 165-166). The City of Oklahoma City in this case violated a trust and sought property for a non-public use. The misrepresentation in the instant case is basic. It is a fraud perpetrated by a trustee which had the positive duty to make a full and complete disclosure of all the facts to the Petitioner landowners and to the court. This action was instituted immediately by the petitioners when they first discovered the fraud.

The present action was commenced immediately upon discovery of the fraud which is well within the limitation period established in the case of *Phillips* v. *Ball*, Okla. 1960, 358 P.2d 193:

> "In cases of fraud the statute of limitations begins to run only from the time of discovery of the fraud, or from such time as the defrauded party, by exercise of ordinary diligence, might have discovered such fraud."

The basic and fundamental issue involved in this action is whether petitioners are entitled to a vacation or modification of the 1941 condemnation proceedings for fraud practiced by the respondent in obtaining the original judgment. In establishing this fraud petitioners relied upon the testimony of the project engineer, V. V. Long, who testified that a contiguous tract (Stevens tract) was not taken because there was no public necessity. The Supreme Court of Oklahoma in its opinion (Appendix "B") reached the following conclusion from petitioners' evidence:

"The ultimate conclusions that would evolve in the instant action if plaintiffs' theory were adopted would be that that City had to condemn the 'Stevens Tract' if it condemned the 24.61 acre tract; or that it could not condemn the 24.61 acre tract without condemning the 'Stevens Tract'. In other words, under plaintiffs' theory, City had no authority to exercise any discretion as to whether it should or should not condemn the 'Stevens Tract' if it condemned the 24.61 acre tract; or had no authority to exercise any discretion as to whether it should or should not condemn the 24.61 acre tract if it did not condemn the 'Stevens Tract'.

"Since City had, as a matter of law, the authority and power to condemn the 24.61 acre tract without also condemning the 'Stevens Tract' and the 'Scrivener Tract' and having acted within its authorized powers, the fact that it did not condemn the 'Stevens Tract' and 'Scrivener Tract' can form no basis for fraud against the plaintiffs or the trial court."

The Supreme Court of Oklahoma in making these statements has completely missed the constitutional questions involved in this action and the purpose of Long's testimony. Petitioners do not contend and have never contended that the respondent City could not exercise its discretion in choosing a tract of land to condemn for proper purposes. Petitioners do state that once the respondent has exercised its discretion and elected to condemn a certain property then an actual necessity must exist and concealment of facts by the respondent known to the respondent at the time, that it is not necessary to condemn the property is fraud upon the court which vitiated the jurisdiction and judgment of the court.

We have found no case except the present case where the doctrine of res judicata has been used to deprive a citizen of his property without due process of law.

PROPOSITION TWO

The Judgment in the Original Condemnation Case and the Judgment and Opinion Found in Appendix "B" Are in Conflict with the 5th and 14th Amendments to the Constitution of the United States and the Constitution of the State of Oklahoma in That Such Action by Respondent Is a Denial of the Property of the Petitioners Without Due Process of Law

In the opinion of the Supreme Court of Oklahoma it is stated:

> "We can only conclude that where a condemnee in a condemnation proceeding does not challenge such proceedings by appeal but accepts the order of the commissioners or the jury as being the total sum of damages such condemnee is entitled to, the condemnation proceedings are res judicata as to all matters which were put in issue, or might have been put in issue or were necessarily implied in the condemnation proceedings."
>
> "We therefore hold the 1941 condemnation proceedings are res judicata as to the necessity for taking the 24.61 acres involved herein."

This holding of the Oklahoma Supreme Court is in conflict with cases of this Court in which certiorari has been granted to review cases where the former land owners have sought to attack in a separate action a judgment condemning property; *Huling* v. ~~Carr~~ Kaw *Valley R.*, 130 U.S. 559, 32 L. Ed. 1045; *Goodrich* v. *Detroit,* 184 U.S. 432, 46 L. Ed. 627, 22 S. Ct. 397.

In the case of *Huling* v. ~~Carr~~ Kaw *Valley Railway Improvement Company,* 130 U.S. 559, 32 L. Ed. 1045, this court granted certiorari in an independent action where the non-resident defendant attacked the jurisdiction of the court

alleging a denial of due process. The court although deciding the case adversely to the person attacking the judgment in its opinion approved such an attack as a proper method. The court stated in referring to the action of the former landowner:

> "It is a collateral attack upon a proceeding which has been completed according to the forms of law. There is no more reason why this want of qualification should, when shown at this stage of the proceeding, invalidate it all, than there is why the discovery, after a judgment and after that judgment has passed beyond the control of the court, that one of the jurors was disqualified, should make absolutely void the verdict and judgment. It is only one of those cases frequently occurring in the administration of the law, in which it is better that errors not pointed out at the proper time should be disregarded, and that, by attempts to correct them, evils much worse should follow than those incident to the error."

It is plain from this language that the court did not deem the error pointed out in the collateral attack as sufficient to set aside the original judgment. However the question presented was of sufficient importance to require the Supreme Court to review the case. In the case at bar it is clear that the method chosen by the petitioners is the proper method to attack a prior judgment where the court specifically lacks jurisdiction because of the lack of an actual public necessity.

The Supreme Court of the State of Oklahoma held in the case of *Grand River Dam Authority* v. *Thompson*, 189 Okla. 89, 113 P.2d 818:

> "The necessity, utility or expediency of the exercise of the right of eminent domain are questions for legislative determination, and the courts have no power to interfere with the reasonable exercises thereof; but

> when the question is raised as to the necessity for taking of any particular piece of property for the public use such question presents a matter for judicial determination."

The petitioners do not advocate that the City could not say that it was necessary to take the property involved. The petitioners do complain of the act of the Respondent City in misrepresenting the necessity to the court, thereby perpetrating a fraud upon these petitioners and denying them their property without process of law. The question of what is a public use is ultimately a judicial question, *Rindge Co.* v. *Los Angeles County,* 262 U.S. 700, 67 L. Ed. 1186; *Sears* v. *Akron,* 246 U.S. 242, ~~68~~ 62 L. Ed. 688.

We respectfully submit that the denial of the Supreme Court of the State of Oklahoma of the petitioners' rights to test the validity of the prior condemnation judgment on the grounds that the judgment was obtained by fraud is repugnant to and in violation of the due process clause of the State of Oklahoma and the Constitution of the United States of America. The condemnation of the land involved herein was a taking of private property for non-public use, a practice which was condemned in the case of *City of Cincinnati* v. *Vester,* 281 U.S. 439, 74 L. Ed. 950. In *City of Cincinnati* case this court stated:

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of the state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

The question presented in this proposition alone is in our opinion worthy of review by this court.

PROPOSITION THREE

The Questions Involved in This Appeal Are of Such Great Public Importance That This Court Should Assume Jurisdiction and Set Out the Proper Guide Lines and Reconcile the Conflict That Exists in the Decisions of the Courts of the United States and the Separate States.

When a Federal Statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, if left by the statute to judicial determination, are nevertheless Federal questions, the answers to which are to be derived from the statute and the Federal policy which it has adopted. To the Federal statute and policy conflicting state law and policy must yield. *Deitrick* v. *Greaney*, 309 U.S. 190, 60 S. Ct. 480, 84 L. Ed. 694; *Sola Electric Company* v. *Jefferson Electric Company*, 63 S. Ct. 172, 317 U.S. 173, 87 L. Ed. 165. In the case *Mercoid* v. *Mid-Continent Investment Company*, 88 L. Ed. 376, 320 U.S. 661, 64 S. Ct. 268, this court held:

> "Courts of equity may and frequently do go much farther both to give and withhold relief and furtherance of the public interest than they are accustomed to go when only private interests are involved."

It has, of course, been decided by the Supreme Court of Oklahoma that the prior judgment condemning the property is res judicata to this action and would preclude any further litigation. The question presented in this proposition is whether this rule ought to give way to considerations of public policy.

The principles of this case are of great importance to every property owner in the United States, as well as

petitioners. The Constitution of Oklahoma, Article 2, Sections 23 and 24, provides that no private property shall be taken or damaged for private use without consent of the owner. Every other state has comparable laws. Municipalities constantly are acquiring private property by eminent domain proceedings. Usually the public necessity of such "taking" is known only to the City Engineer who has made a complete technical study of the project. Of course, where the facts reveal a public necessity for the "taking" of private property, the Sovereignty, or its subdivisions, can, and should, acquire same. But where a City conducts an Engineering Surety and ascertains there is *no public necessity* for any "taking", and such City *with such knowledge* seeks to acquire private property in condemnation proceedings and represents the jurisdictional prerequisite of public necessity to the condemnation court when such City knows there actually is no public necessity whatsoever a jurisdictional fraud is perpetrated upon the court by such City. Particularly this is true where the property so "taken" is never actually used in any way for any public purpose, but is later declared surplus and approved for sale by the City.

For a State—or subdivision thereof—to so deprive a United States citizen of his property without due process of Law is comparable legally to depriving him of his liberty without due process of Law, *Escobedo* v. *United States*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758; *Shepperd* v. *Maxwell*, ... U.S. ....., 16 L. Ed. 2d 600, 86 S. Ct. .....

We respectfully submit that the questions involved in this action are of sufficient public interest that would require and involve general Federal policy. That this court

should, in its sound judicial discretion, grant the petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Very respectfully submitted,

LESLIE L. CONNER
CHARLES HILLS JOHNS
O. A. CARGILL, JR.
JAMES M. LITTLE
Attorneys for Petitioners

Of Counsel:
CONNER, LITTLE & CONNER
630-636 Hightower Building
Oklahoma City, Oklahoma

July, 1965

APPENDIX A

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IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

G. C. COOPER, BERNARD COOPER, and ELIZABETH COOPER, nee MAULDING, Plaintiffs, vs. CITY OF OKLAHOMA CITY, a municipal corporation, Defendant.	No. 149524

Judgment and Decree

NOW, on this 17th day of January, 1963, pursuant to notice given all parties by the Court, plaintiffs appeared by their attorneys of record, Charles Hill Johns and O. A. Cargill, and defendant, the City of Oklahoma City, a municipal corporation, appearing by Roy H. Semtner, Municipal Counselor, and Charles E. Chilton and James G. Hamill, Assistant Municipal Counselors, and the Court thereupon announced judgment in this Cause in favor of plaintiffs and against defendant, all as set forth in written findings of fact and conclusions of law, filed in this cause on this date; the said findings of fact and conclusions of law are appended to this decree and made a part hereof as the judgment of this Court.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that plaintiffs G. C. Cooper, Bernard Cooper, and Elizabeth Maulding, are the owners in fee simple of the following described property and premises, to wit:

A part or parcel of the Northeast Quarter of Section Two (2), Township Twelve (12) North, Range four (4) West, I. M., in Oklahoma County, Oklahoma, more particularly described as follows:

Beginning at the southeast corner of the Northeast Quarter of said Section Two (2); thence northerly along the east line of said Section Two (2) a distance of 500.0 feet; thence westerly a distance of 1312.0 feet, more or less, along a line parallel to the south line of said Northeast Quarter to a point on the west line of the Southeast Quarter of said Northeast Quarter and 500.0 feet north of the south line of said Northeast Quarter; thence southwesterly a distance of 130.0 feet, more or less, to a point which is 420.0 feet north of the south line of said Northeast Quarter and 110.0 feet west of the west line of the Southeast Quarter of said Northeast Quarter; thence southwesterly a distance of 800.0 feet, more or less, to a point which is 435.0 feet east of the west line of said Northeast Quarter and 300.0 feet north of the south line of said Northeast Quarter; thence southwesterly a distance of 268.6 feet, more or less, to a point which is 185.0 feet east of the west line of said Northeast Quarter and 230.0 feet north of the south line of said Northeast Quarter; thence southwesterly for 241.4 feet, more or less, to a point on the west line of said Northeast Quarter, which is 56.8 feet north of the southwest corner of the Northeast Quarter; thence easterly along the south line of the Northeast Quarter a distance of 2624.0 feet, more or less, to the point of beginning, containing in all 24.61 acres, more or less,

IT IS FURTHER CONSIDERED ORDERED, ADJUDGED AND DECREED by the Court that the proceed-

ings in Cause Numbered 104026, styled *The City of Oklahoma City, a Municipal Corporation,* v. *Mevon Corporation, et al.*, and the judgment rendered therein adjudicating the title to the above described property in defendant be and the same is hereby vacated, set aside and held for naught in accordance with the findings of fact and conclusions of law of the Court appended to this decree.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that plaintiffs shall pay to defendant the sum of $2,461.00, being the amount of funds received by plaintiffs insofar as the said 24.61 acres of land herein described is concerned.

Defendant is allowed and granted exceptions herein.

/s/ GLEN O. MORRIS
Judge of the District Court

O.K. as to form

/s/ CHAS. HILL JOHNS
Charles Hill Johns
/s/ O. A. CARGILL
O. A. Cargill
Attorneys for Plaintiffs

ROY H. SEMTNER
CHARLES E. CHILTON
JAMES G. HAMILL
By /s/ CHARLES E CHILTON
Attorneys for Defendant.

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IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA

G. C. COOPER, BERNARD COOPER, and ELIZABETH COOPER, nee MAULDING, Plaintiffs, vs. CITY OF OKLAHOMA CITY, a municipal corporation, Defendant.	No. 149,524

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

THE COURT FINDS:

1. That Lake Hefner is a reservoir of water that is supplied almost entirely by waters received and transported through a canal from the North Canadian River and the North Canadian Watershed; it is conceded by defendant, the City of Oklahoma City, and the evidence reveals, that the waters making up approximately 98 per cent of the waters of Lake Hefner Reservoir are polluted when such waters first empty into said Lake Hefner from said canal.

2. That the original survey and plans for Lake Hefner Reservoir included and provided for the construction of a roadway around said Lake Hefner, which roadway and attendant dams and abutments would act in making the highwater mark of the lake itself at the points now presently reflected upon plaintiffs' Exhibits 3 and 4, which

exhibits were prepared by the Water Department of the City of Oklahoma City in March, 1960, pursuant to the resolutions of the City Council of Oklahoma City on March 22, 1960, and the attendant proceedings, whereby the City of Oklahoma City declared that the property involved in this action was in no way necessary or needed for reservoir or other public purposes and should be sold.

3. That the particular lands involved in this action were never at any time a part of the reservoir of Lake Hefner itself, and the evidence reveals and such facts have been conceded by the City of Oklahoma City, but that these particular lands were included in a resolution of the City Council of Oklahoma City of a "blanket" character, describing certain sections and quarter-sections of land without describing, in particularity, (by metes and bounds) the particular lands sought to be taken beyond the highwater mark of the said proposed reservoir itself, and such lands, including the lands involved in this action, were only included in the original condemnation proceeding under the theory that it was necessary to procure said lands for the protection of the proposed water reservoir against possible pollution from surface waters flowing thereinto.

4. That the land involved in this action is vacant land, and is now in exactly the same condition as it was upon the date of the original condemnation action, usual and ordinary vegetation changes excepted; that the City of Oklahoma City has done no acts of improvement of any kind upon the property involved in this action since the date of the original condemnation proceeding.

5. That immediately contiguous to the land involved in this action is a tract of land comprising some eleven acres, known as the "Stevens Home Tract", which consisted, at the time of the original suit, and now consists,

of a tract of land with houses, a barn with livestock, a barnyard covered with animal manure, a chicken house and the attendant manure of fowls, a cess pool and septic tank for sewage disposal, and other buildings, the major portion of the "Stevens Tract" being closer to Lake Hefner than the Cooper property herein involved.

6. That Mr. V. V. Long, now deceased, was the engineer of the City of Oklahoma City and was in charge of the entire project of the Bluff Creek (Lake Hefner) Project.

7. That the said V. V. Long testified in the condemnation proceedings pertaining to Tract Numbered 32, which was in a separate trial involving property in the Southeast Quarter of Section 34, Township 13 North, Range 4 West, Oklahoma County, Oklahoma, being upon the North side of the proposed Lake Hefner Reservoir, to the effect that the City of Oklahoma City did not need to take, and it was not necessary for the City of Oklahoma City to take and acquire, the Stevens Home Tract" (immediatly contiguous to the property involved herein) for the reason and because of the fact that the City could adequately protect the proposed reservoir of Lake Hefner from any possible pollution emanating from surface waters over and from the said "Stevens Home Property."

8. That the City of Oklahoma City, in the original condemnation proceeding involving this particular property, withheld and did not make a full and complete disclosure of the facts (as so testified to by V. V. Long, as aforesaid), and such facts so withheld and concealed by the City of Oklahoma City were facts indispensable and essential as a condition precedent to the power and right of the City of Oklahoma City to take and acquire in Eminent Domain the private property of plaintiffs herein; that said facts so withheld and concealed were withheld from

the Court in the original condemnation proceeding and from plaintiffs herein, and the concealment of such facts, so admitted in such testimony, constituted legal fraud, extrinsic to the record, and constituted legal fraud affecting the jurisdiction and power of the court in the original action to extend to the City of Oklahoma City the right to take and acquire the private property of plaintiffs herein in Eminent Domain.

9. That V. V. Long also testified in said condemnation case, as aforesaid, that the Scrivner property, described and set forth in the exhibits in this cause and introduced in evidence, was not necessary to be taken by reason of the fact that the City of Oklahoma City could adequately protect the proposed reservoir from pollution from the surface waters flowing over and above the said Scrivner property to the said proposed reservoir, and that the said Scrivner tract was in the vicinity of the property involved in this action, and the Scrivner property is closer to Lake Hefner than the Cooper property.

10. That the City of Oklahoma City, on the 22nd day of March, 1960, passed and enacted a resolution and ordinance by the terms of which the City of Oklahoma City determined that the property involved herein was not needed for reservoir or other public purposes and that the same should be sold; that immediately thereafter the City of Oklahoma City advertised said property involved therein for sale and promulgated certain maps, which have been introduced in evidence in this cause, reflecting that the highwater mark of said Lake Hefner is determined by the roadways and dams builded by the City of Oklahoma City pursuant to the original plan of survey which reflects the property involved in this action, in the main, to be more than 660 feet from the highwater mark of said reservoir.

11. That shortly thereafter, on the 31st day of March, 1960, plaintiffs instituted this action seeking to recover the title to this property involved in this cause, asserting that they were the owners of this property as alleged in the petition and amended petition and pleadings in this cause.

12. That thereafter, various legal arguments were interposed in this action and this cause was set down for trial in this Court on May 28, 1960, and after said cause had been set for trial on April 10, 1960, the City of Oklahoma City passed a resolution declaring that the property involved herein was necessary for reservoir purposes and attempted to rescind the action of the City Council on May 22, 1960, all as reflected by the evidence introduced in this cause.

13. That thereafter, proceedings were held and conducted by the City Council of Oklahoma City on May 15, 1962, at which time it was conceded in the discussions before the City Council that the property involved in this action was not needed for reservoir purposes, and said proceedings were conducted pertaining to the adjustment of equities between plaintiffs herein and the City of Oklahoma City; that thereafter, on May 22, 1962, the City of Oklahoma City rescinded all action taken on May 15, 1962.

14. The Court finds that this action was timely instituted and was instituted within two years from the discovery of the facts so concealed and withheld by the City of Oklahoma City, and that the facts so withheld and concealed by the City of Oklahoma City pertaining to the "necessity" of the taking of the particular property involved in this action constituted a legal fraud, and constituted bad faith, and constituted an abuse of discretion of the City of Oklahoma City in the original condemnation action, and that such was extrinsic to the record, and that plaintiffs are entitled to maintain this action.

15. The Court finds that upon the date of the filing of the original condemnation action, being Cause Numbered 104026, styled *The City of Oklahoma City, a municipal corporation,* v. *Mevon Corporation, et al.*, there existed in fact no necessity of any kind or character for the City of Oklahoma City to take and acquire the particular property involved in this action from plaintiffs; that the City was aware of said facts at the time of the institution and trial of said original condemnation proceedings Numbered 104026, as aforesaid, and has been aware of such facts at all times thereafter; that the City of Oklahoma City concealed from plaintiffs and from the Court in said action such facts pertaining to the "lack of necessity" of the taking of the property involved herein, and that the withholding and concealment of such facts constituted a legal fraud upon the Court in said original action numbered 104026, and upon the plaintiffs in this Cause who were the defendants therein; and that such legal fraud pertained to the jurisdiction and power of the Court in Cause Numbered 104026 to take the private property of plaintiffs herein by the City of Oklahoma City; and the subsequent facts and developments, that is, the fact that the property involved herein has remained in the same condition since the original condemnation proceeding to the present date, and the fact that the City of Oklahoma City did, on March 22, 1960, declare that said property was not needed for any public purpose whatsoever, for reservoir purposes or any other purpose, and the attendant developments and actions taken by the City of Oklahoma City constitutes evidence that this particular property never at any time was in any way necessary to be taken and acquired by the City of Oklahoma City for any public purpose whatsoever; that all of the facts developed from the evidence in this cause reflect and show by cogent and convincing cir-

cumstances that the City of Oklahoma City knew upon the filing and trial of the original condemnation that in Cause Numbered 104026, as aforesaid, the property involved herein was not in any way necessary for the City of Oklahoma City to have and acquire for any public purpose whatsoever, and that the City of Oklahoma City knew at the time of the filing and trial of said action that it was not necessary for the City of Oklahoma City to have and acquire the property involved in this action for any public purpose whatsoever, and that the City of Oklahoma City concealed and withheld such facts and knowledge from the Court and from the plaintiffs, and that such facts and knowledge thereof were not discovered by plaintiffs herein until March 22, 1960; that the withholding and concealment of such knowledge and such facts by the City of Oklahoma City constituted a legal fraud and constituted bad faith and constituted an abuse of discretion on the part of the City of Oklahoma City, and such legal fraud and bad faith and abuse of discretion were and are jurisdictional as to the power and jurisdiction of the Court in said Cause Numbered 104026, and entitle plaintiffs to the relief they pray for herein.

16. That plaintiffs did not discover the fraud until March of 1960.

17. The Court finds that the property involved was contiguous to property known as the "Stevens Tract", and the City of Oklahoma City knew that the "Stevens property" was not necessary to be taken in order to protect Lake Hefner from possible pollution. The Court finds that under all the evidence it was not necessary for the City to take the property involved for any public purpose and that the City knew it was not necessary for it to take the property involved at the time of the original filing and trial of the condemnation proceeding, Cause

Numbered 104026, *supra*. That the action of Oklahoma City was arbitrary and discriminatory and was an abuse of discretion of Oklahoma City to seek to condemn said property involved when the engineers of Oklahoma City knew it was not necessary for the City to take said property involved for public purposes.

18. The Court has viewed the property involved, and the surrounding property, and has done so at the request of the parties hereto. Under the evidence herein and a view of the premises, the Court finds that it was not necessary for the City of Oklahoma City, at the date of the original case (No. 104026), nor at any time thereafter, to take or acquire the property involved for the necessity of protecting Lake Hefner from surface pollution, or for any other public purpose whatsoever.

19. The Court finds that under all the facts involved in this cause and under all the admissions and testimony aforesaid, plaintiffs are entitled to a decree of this Court adjudicating that they are the owners of the property involved in this action and that an appropriate decree should be entered adjudicating them to be the owners of the property involved herein; the Court finds that plaintiffs have in open Court tendered to the City of Oklahoma City the money which they received from the City of Oklahoma City in the original condemnation action, and the Court finds that by such tender plaintiffs have done and are willing to do equity in all respects; the Court further finds that plaintiffs should pay to defendant, the City of Oklahoma City, such sums of money paid to plaintiffs by defendant, City of Oklahoma City, in the original condemnation action (Cause Numbered 104026), such payments to be made by plaintiffs to defendants upon the acreage involved in this action, and so determined to be the property of plaintiffs herein.

CONCLUSIONS OF LAW

THE COURT CONCLUDES AS A MATTER OF LAW:

1. That this action is an equitable proceeding to set aside the original judgment in Cause Numbered 104026, styled *The City of Oklahoma City, a municipal corporation,* v. *Mevon Corporation, et al.*, insofar as the lands involved in this action are concerned, and by this equitable proceeding plaintiffs have asserted that the successful party in said judgment procured the same by resulting, constructive and extrinsic fraud interposed upon the Court and plaintiffs herein.

The Court concludes as a matter of law that the City Council of the City of Oklahoma City at no time perpetrated, or was guilty of any intentional fraud in this action. However, the Court finds that by reason of the facts heretofore found, the agents and employees of the City of Oklahoma City have, by their acts and deeds, concealed and withheld facts which they had a duty to reveal and disclose, all of which constitute legal resulting, constructive and extrinsic fraud and bad faith, and caused the City of Oklahoma City to abuse its discretion insofar as the property and premises involved in this action are concerned, and have constituted bad faith and legal fraud in the premises.

2. The Court concludes as a matter of law that defendant in this Cause, the City of Oklahoma City, Oklahoma, failed and neglected to disclose to the Court and to plaintiffs in this cause that it was not necessary for plaintiff to have and acquire the property involved in this action in order to protect the Lake Hefner Reservoir from possible pollution, inasmuch as defendant, the City of Oklahoma City, Oklahoma, now, and at the time of the original action, aforesaid, was completely aware of the fact that it,

the City of Oklahoma City, Oklahoma, could adequately protect the reservoir of Lake Hefner from possible pollution emanating from surface drainage over the property involved in this action without the taking and acquisition thereof; and by reason of the fact that the City of Oklahoma City, having full knowledge of such facts, concealed and neglected to inform and advise the Court and plaintiffs herein of such facts in said Cause Numbered 104026, *supra*, the defendant City of Oklahoma City, Oklahoma, has been guilty of legal resulting, constructive and extrinsic fraud and bad faith and abuse of discretion in the premises.

3. That plaintiffs, by reason of the facts heretofore found, and by reason of the conclusions of law entered herein, are entitled to all of the relief prayed for herein, this action being an equitable proceeding to set aside the judgment heretofore rendered resulting from legal, resulting, constructive and extrinsic fraud practiced by defendant in said Cause Numbered 104026, *supra*, which fraud induced the entering of the judgment of this Court in said Cause Numbered 104026, wherein such fraud was extrinsic to the record and caused the Court to entertain jurisdiction of the subject matter thereof.

4. That plaintiffs are entitled to have and receive all of the relief prayed for by them in their petition and amended petition, subject to their tender to defendant, the City of Oklahoma City, Oklahoma, such proportionate part of the money and things of value which they have received in the original proceeding, Cause Numbered 104026, and that upon the entry of the decree of this Court, plaintiffs shall pay to defendant that proportionate amount of the funds that they have received from defendant by reason of the said original proceeding, Cause Numbered 104026. based and predicated upon that proportion of the original acreage involved in this particular action.

5. That plaintiffs are entitled to a decree of this Court adjudicating them to be the owners of the property involved herein, subject only to the repayment of the money to defendant as hereinabove set forth.

6. Counsel for plaintiffs are directed to prepare a decree appending the findings of fact and conclusions of law set forth herein, and entering judgment for plaintiffs in accordance therewith. Exceptions allowed defendant.

DONE IN OPEN COURT this 17th day of January, 1963.

/s/ GLEN O. MORRIS
Judge of the District Court

ENDORSED:

FILED, District Court, Oklahoma County, Okla., JAN. 18, 11:45 AM '63, DALE SMITH, Court Clerk, By /s/ M. Emerson.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

The City of Oklahoma City, a Municipal Corporation, Plaintiff in Error, vs. G. C. Cooper, Bernard Cooper, and Elizabeth Maulding, nee Cooper, Defendants in Error.	No. 40,682

Syllabus

1. Where a property owner does not challenge the correctness of eminent domain proceedings by appeal, but accepts the award of the Commissioners or the jury, the condemnation proceedings are res judicata as to all matters which were put in issue, or might have been put in issue or were necessarily implied in the condemnation proceedings.

2. The necessity of taking property for public purposes in eminent domain proceedings must be determined by the conditions existing at the time of the taking, and after such proceedings have become final and the condemnor has acquired fee simple title to the property condemned, the fact that condemnor no longer needs such condemned land for public purposes forms no grounds for modification or vacation of the eminent domain proceedings.

3. The word "necessity", as the word is employed in condemnation proceedings, does not mean an absolute but only a reasonable necessity, and a municipality, in the exercise of its powers of eminent domain, has the power and authority to condemn property, in the absence of fraud, bad faith or an abuse of discretion, although such property sought to be condemned is not absolutely necessary for public purposes.

4. Where a municipality in an eminent domain proceeding condemns certain lands for public purposes, the failure of such municipality in not condemning other lands in the same proceeding which it had power and authority to condemn, does not constitute fraud.

5. Where an application is filed in the Supreme Court as provided by Title 12 O. S. 1961, Sec. 963, for an order extending the time for the making and serving of a case made, or the filing of the proceedings in error, an order issued by a Justice of this Court extending such time for good cause shown is conclusive on this Court where the record discloses that proper notice was given and a hearing was had

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

Hon. Glen O. Morris, Trial Judge.

Defendants in error commenced proceedings to vacate a condemnation proceeding insofar as such proceeding related to 24.61 acres of land. The trial court vacated such proceedings and entered judgment for defendants in error. Plaintiff in error, the condemnor, appeals from the order overruling its motion for new trial.

Judgment Reversed with Directions

Roy H. Semtner, Municipal Counselor; James G. Hamill, Charles E. Chilton, Assistant Municipal Counselors, for Plaintiff in Error.

Charles Hill Johns, 815 Cravens Bldg., Oklahoma City, Oklahoma, for Defendants in Error.

Oklahoma Association of Municipal Attorneys, by Charles E. Norman, City Attorney of Tulsa, and John Allen Phillips, II, City Attorney of Durant, for Amicus Curiae.

IRWIN, J.:

In July, 1941, the City of Oklahoma City, hereinafter referred to as City, commenced eminent domain proceedings to acquire land for reservoir purposes. By virtue of these proceedings, City acquired certain lands and what is now known as "Lake Hefner" was constructed.

Included in the 1941 eminent domain proceedings were three tracts of land which were owned separately by G. C. Cooper, Bernard Cooper, and Elizabeth Maulding, nee Cooper, defendants in error in the instant appeal and hereinafter referred to as plaintiffs.

On March 22, 1960, the Council of City, adopted a resolution wherein it found and declared that 23.85 acres, more or less, which were specifically described, and another tract containing 33.14 acres, more or less, were "* * * surplus, not needed for reservoir or public purposes, and should be sold". The 23.85 acres form a part of the three tracts previously owned separately by plaintiffs, and which were condemned in the 1941 proceedings, and is the acreage involved in this action.

On March 31, 1960, plaintiffs commenced the instant action to vacate, set aside and annul the 1941 condemnation proceedings insofar as the same concerns 24.61 acres specifically described. The 24.61 acres described in plaintiffs' petition and the 23.85 acres described in City's Resolution of March 22, 1960, constitute the same tract of land and will be referred to as the 24.61 acre tract. The alleged

grounds for vacation of that portion of the 1941 condemnations, wherein City acquired the 24.61 acres were that the same were not needed for reservoir purposes or other public purposes and that extrinsic legal fraud was practiced or perpetrated by City in taking said property by eminent domain proceedings. In plaintiffs' amended petition, Count 2, plaintiffs alleged that City had completely abandoned the use of the 24.61 acres for reservoir purposes, and title to said property by virtue of such abandonment reverted to plaintiffs.

The trial court found City at no time perpetrated, or was guilty of any intentional fraud, but the agents and employees of City, by their acts and deeds, concealed and withheld certain facts which they had the duty to reveal and disclose, all of which constitute legal resulting, constructive and extrinsic fraud and bad faith and caused City to abuse its discretion insofar as the 24.61 acre tract is concerned. The trial court further found that City failed to disclose to the trial court in the 1941 eminent domain proceedings that it was not necessary for City to acquire the 24.61 acres in order to protect the water reservoir from possible pollution, inasmuch as City, at the time of such taking, was completely aware of the fact that it could adequately protect the reservoir from possible pollution emanating from surface water from the 24.61 acres without the taking and acquisition thereof; and that by reason of City having full knowledge of such facts and concealing and neglecting to disclose the same, City has been guilty of legal resulting, constructive and extrinsic fraud, bad faith and abuse of discretion in the premises.

The trial court vacated the judgment rendered in the eminent domain proceedings which were commenced in 1941, insofar as said proceedings concern the 24.61 acres involved herein and entered judgment for plaintiffs and

directed they pay City the sum of $2,461.00, being the sum originally received for the property. City perfected this appeal from an order overruling its motion for a new trial.

FACTS

Plaintiffs were the owners of the S½ NE¼ and part of the N½ NE¼ of Sec. 2, 12 N, 4 W, Oklahoma County, when the 1941 eminent domain proceedings were commenced and all of their land was included in said proceedings. The 24.61 acres herein involved are located in the S½ S½ NE¼ and extend across the entire south boundary of said quarter section. It is an irregular tract and measures approximately 2624 feet east and west, and from 56.8 feet to 500 feet north and south. The acreage was unimproved and is located on the southern side of Lake Hefner.

Two tracts of land hereinafter described as the "Stevens Tract" and the "Scrivener Tract" were not condemned in the 1941 proceedings. Plaintiffs' theory is that if it were not necessary to condemn these tracts, then it was not necessary to condemn the 24.61 acres.

The "Stevens" owned the west 79.38 acres of the NW¼ of Sec. 1, 12 N, 4 W, Oklahoma County. This acreage is contiguous to the land previously owned by plaintiffs. In the 1941 condemnation proceedings, the 79.38 acres owned by the "Stevens" were specifically described but there was excepted from such proceedings a 10 acre tract on the south end of the 79.38 tract. This 10 acre tract, which will be referred to as the "Stevens Tract", and which was not condemned in the 1941 proceedings, was highly developed and is contiguous to the 24.61 acres herein involved.

The "Scriveners" owned the remainder of the NW¼ of Sec. 1, 12 N, 4 W, and all of this land was condemned except a small tract in the northeast corner which was highly developed. That part of the "Scriveners" land which was not condemned was specifically excepted from the 1941 proceedings and will be referred to as the "Scrivener Tract."

In the 1941 condemnation proceedings, another landowner had contested the necessity of taking his property for reservoir purposes and there was introduced in evidence the fact that City had excepted from said proceedings the "Stevens Tract" and the "Scrivener Tract". In those proceedings, a Mr. V. V. Long, a consulting engineer, had testified that the "Stevens Tract" and the "Scrivener Tract" were not condemned. In Mr. Long's testimony, so adduced, he testified that the two properties were "* * * exempted for just and simple reason of economics. Both of those properties were highly developed and it would cost the City considerable money, * * * and they could be controlled fairly well insofar as pollution is concerned."

Although City challenges the admissibility of Mr. Long's testimony, we will assume such testimony to be admissible for the purpose of determining this appeal.

In the Findings of Fact, the trial court found that City "withheld and did not make a complete disclosure of the facts (as so testified to by V. V. Long, as aforesaid), and such facts so withheld and concealed by the city * * * were facts indispensable and essential as a condition precedent to the power and right of the City * * * to take and acquire in Eminent Domain the private property of plaintiffs herein; that said facts so withheld and concealed were withheld from the court in the original condemnation proceeding and from plaintiffs herein, and the con-

cealment of such facts, so admitted in such testimony, constituted legal fraud, extrinsic to the record, and constituted legal fraud affecting the jurisdiction and power of the court in the original action to extend to the City * * * the right to take and acquire the private property of plaintiffs herein in Eminent Domain."

City produced evidence from expert witnesses that the overwhelming majority, if not all, of the 24.61 acres herein involved were within 660 feet of the high water mark of the proposed reservoir when the 1941 condemnation proceedings were commenced. A Mr. Herman, who was a registered engineer and employed by City when the 1941 condemnation proceedings were had, stated that the land involved slopes toward Lake Hefner; and that the 24.61 acre tract was necessary for the protection of Lake Hefner at the time City condemned it and that it is still necessary for such protection. A Mr. Karl Bean, a registered engineer and employee of City when the land was originally condemned, stated that he made a survey of the land for the 1941 condemnation proceedings and that it was necessary to condemn the property "* * * in order to protect the lake from contamination and to act as a buffer zone for the lake reservoir property."

Although plaintiffs argue there has been no change in conditions since the 1941 condemnation proceedings, the record discloses that a sanitary diversion ditch has been constructed around the southern shore of Lake Hefner, which diverts polluted water from draining into the lake from the south (this also includes the 24.61 acres in question) and when this project was completed in 1959, the high water line and the 660 feet water line, which had existed since 1941, were changed.

The record also discloses that on May 22, 1962, the City Council enacted a resolution rescinding its previous action taken on March 22, 1960, which resolution had declared the property involved was surplus, not needed for public purposes, and should be sold.

PROPOSITION I

Plaintiff contends that the question of necessity of taking the 24.61 acres by City for public use was never passed upon by the trial court in the original 1941 condemnation proceedings; and that this legal question is still pending and has never been passed upon by the trial court in the original proceedings even to this late date.

The original condemnation proceedings were commenced on July 24, 1941, and the record discloses that on August 26, 1941, each of the plaintiffs herein filed an answer specifically denying that it was necessary for City to take and appropriate his or her particular tract for reservoir purposes. On October 9, 1941, the Commissioners filed their report of their appraisal and on October 17, 1941, each of plaintiffs filed a demand for a jury trial. Without setting forth other details of the proceedings, it is sufficient to say that each plaintiff did not challenge the correctness of the proceedings by appeal but accepted and received damages in the amount determined by the Commissioners or the jury for his or her separate tract.

In Henry v. United States, 46 F.2d 640, the original owner of the land condemned brought an action to vacate the condemnation proceedings nine years after the condemnation proceedings had become final and the award had been paid and accepted. On appeal from a dismissal of the action, the Circuit Court of Appeals, Third Circuit, said: "When a property owner accepts the award of dam-

ages for taking his property under eminent domain, he can not raise the question as to the validity of the proceedings or taking."

In 30 C.J.S., Eminent Domain, § 327 (c), page 201, we find this language:

> "The principle of res judicata is applicable in condemnation cases. In accordance with the principles governing the doctrine of res judicata with respect to judgments generally, * * * where an award or judgment is regularly made, and, as held by some authorities, is not appealed from, the rights of the respective parties become definitely fixed thereby, and it is conclusively binding on all the parties of record and likewise, on their privies and grantees, * * *."

In Section 328, pages 204, 205, of the same volume, it is stated that: "the principles of res judicata apply to final orders, judgments, and decrees in condemnation proceedings as to matters therein litigated. In accordance with the rules governing the application of the doctrine of res judicata to judgments generally with respect to matters included thereby, * * * parties and their privies are concluded as to all matters which were put in issue, or might have been put in issue, or were necessarily implied in the decision in the condemnation proceedings, such as the right to condemn, and the legality of the improvement for which the property was taken, the necessity, quantity, or nature of the property required, * * *."

We can only conclude that where a condemnee in a condemnation proceeding does not challenge such proceedings by appeal but accepts the award of the Commissioners or the jury as being the total sum of damages such condemnee is entitled to, the condemnation proceedings are res judicata as to all matters which were put in issue, or might have been put in issue or were necessarily implied in the condemnation proceedings.

We therefore hold the 1941 condemnation proceedings are res judicata as to the necessity for taking the 24.61 acres involved herein.

PROPOSITION II

Plaintiffs contend that the power of eminent domain is delegated to a City as a public trust and a City holds its rights as a public trustee, and where it possesses information that it is not actually necessary to condemn certain land for any public purpose whatsoever and conceals such information, any action in condemnation to acquire such land on the part of a City is a gigantic fraud practiced upon the private property owner and upon the court.

Condemnation proceedings constitute "adversary proceedings" as that term is usually employed (see People v. Superior Court of Los Angeles County, Calif., 118 P.2d 47) whether the proceedings are or are not contested, and we find no authority sustaining the proposition that a municipality, as condemnor, owes a greater duty to its condemnee, than does any other condemnor to its condemnee.

The alleged fraud perpetrated upon the plaintiffs and upon the trial court in the 1941 condemnation proceedings is based on the testimony of Mr. V. V. Long, heretofore set out to the effect that City did not condemn the "Stevens Tract" and the "Scrivener Tract". In their brief plaintiffs state that the testimony shows that the potential danger of pollution from the "Stevens Tract" was far, far greater than from the tract herein involved and it is axiomatic if the City did not need the "Stevens Tract", it did not need the 24.61 acre tract. Plaintiff also argues that the City Council, in its resolution adopted in 1960 which declared that said tract was surplus and unnecessary for public use, admits that there was no necessity for taking the 24.61 acres in the 1941 condemnation proceedings.

In Fischer v. Oklahoma City, 198 Okl. 22, 174 P.2d 244, we said: "Need for taking the particular land and the estate therein to be taken, like the issue of compensation for the taking, is judged by the condition existing at the time of the taking."

The Resolution of the City Council adopted in July, 1941, and all of the 1941 condemnation proceedings, insofar as the instant acreage is concerned, had reference to the acquisition of a fee simple title by City and in no instance did the pleadings, orders or reports relate to a lesser interest. Title 11 O. S. 1961, Sec. 298, enacted in 1923, authorized the City to acquire fee simple title to the property. See Springfield v. City of Perry, Okl., 358 P.2d 848. Therefore the 1941 condemnation proceedings vested in City a fee simple title to the 24.61 acre tract.

Since the necessity for taking the 24.61 acre tract must be determined by the conditions existing at the time of the taking in 1941, and we have heretofore determined that the 1941 condemnation proceedings are res judicata as to the necessity for taking, and by such proceedings City acquired fee simple title to the property, the fact that City adopted a Resolution in 1960 declaring such acreage to be surplus and unnecessary for public purposes, or the fact that it may or may not now be necessary for City to retain the acreage for public purposes, are immaterial.

Therefore, the basic and fundamental issue presented is whether plaintiffs are entitled to a vacation or modification of the 1941 condemnation proceedings under Title 12 O. S. 1961, Sec. 1031, et seq., which provides, inter alia, that the district court shall have power to vacate or modify its own judgments or orders for fraud practiced by the successful party in obtaining the judgment or order.

This Court has consistently held that fraud which vitiates a judgment and which will authorize a court of equity, in an attack thereon to vacate it, *is a fraud extraneous of the record* by which the court was imposed upon in the proceeding and by which the complaining party was prevented from having his interest fairly presented and considered by the court. See Thigpen v. Deutsch, 66 Okl. 19, 166 P. 901; Webster v. Oklahoma Railway Co., 166 Okl. 306, 32 P.2d 945; Lewis v. Couch, 194 Okl. 632, 154 P.2d 51; and Chisholm v. Stephenson, Okl., 36 P.2d 229. See also United States v. Throckmorton, 98 U.S. 61, 25 U. Ed. 82, and 88 ALR 1201.

For the purpose of determining the issues presented, we will assume, without deciding, that potential danger of pollution from the "Stevens Tract" which was not condemned was greater than from the 24.61 acre tract involved herein, and that the City could have protected the reservoir from potential pollution from the 24.61 acre tract. By assuming these facts we place squarely in issue plaintiffs' theory that failure to divulge these facts to the plaintiffs and the trial court when the 1941 condemnation proceedings were had, constitutes a gigantic fraud against plaintiffs and the trial court.

The force and effect of the 1941 proceedings relating to notice to plaintiffs and the trial court wherein the "Stevens Tract" was specifically exempted from the proceedings is not material in determining the issue herein presented.

The ultimate conclusions that would evolve in the instant action if plaintiffs' theory were adopted would be that that City had to condemn the "Stevens Tract" if it condemned the 24.61 acre tract; or that it could not condemn the 24.61 acre tract without condemning the "Stevens

Tract". In other words, under plaintiffs' theory, City had no authority to exercise any discretion as to whether it should or should not condemn the "Stevens Tract" if it condemned the 24.61 acre tract; or had no authority to exercise any discretion as to whether it should or should not condemn the 24.61 acre tract if it did not condemn the "Stevens Tract."

In Seba v. Independent School Dist. No. 3 of Dewey County, Okla., 253 P.2d 559, we said that the ordinary rule in condemnation cases is that while the particular property sought to be condemned must be necessary for the proposed project, the condemnor's decision as to the necessity for taking particular property will not be disturbed in the absence of fraud, bad faith or abuse of discretion. In Graham v. City of Tulsa, 261 P.2d 893, we recognized that a City in the exercise of its discretion and absence of fraud or bad faith, could properly condemn 20 feet from one block and 60 feet from another block where the City desired to extend a dead-end street. In that case we said: "The evidence justifies the taking of only 20 feet off the hospital premises on account of the building, and the occupancy, and the building and occupancy program of the hospital, which is a large and important hospital of the City of Tulsa."

In Joslin Manufacturing Co. v. City of Province, 262 U.S. 666, 67 L. Ed. 1167, the Supreme Court of the United States held that where a municipal corporation is empowered by the legislature to take property for a water supply within a definitely restricted area, it may take less than the area, but not more.

In White v. City of Pawhuska, 130 Okl. 156, 265 P. 1059, we held:

> "The word 'necessity' in connection with condemnation proceedings does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expenses to the condemning party and property owners consistent with such benefit."

The testimony of V. V. Long, which plaintiffs rely upon to support their cause clearly demonstrates why City did not condemn the "Stevens Tract" in the 1941 condemnation proceedings. He said it was for just the simple reason of economics; that it was highly developed and it would cost the City considerable money; and it could be controlled fairly well insofar as pollution was concerned.

Although City may have been authorized and could have condemned the "Stevens Tract" this does not mean, as a matter of law, that City had to condemn it. By the same token, the fact that City did not condemn the "Stevens Tract", although it may have been authorized and could have condemned said property, does not mean, as a matter of law, that City could not condemn the 24.61 acre tract without condemning the "Stevens Tract".

We can only conclude that a municipality in the exercise of its powers of eminent domain does not have to include in its condemnation proceedings all the land that it is authorized to take, but may include in such proceedings all the land that it is authorized to take, but may include in such proceedings less land than it is authorized to take. We further conclude that the word "necessity" as the word is employed in condemnation proceedings, does not mean an absolute but only a reasonable necessity, and a municipality in the exercise of its powers of eminent domain, has the power and authority to condemn property, in the absence of fraud, bad faith or an abuse of discretion, although such property sought to be condemned is not absolutely necessary for public purposes.

Whether or not it was necessary to condemn the 24.61 acre tract is not an issue in this appeal as this is not an appeal from the condemnation proceedings but this appeal involves the vacation or modification of the condemnation proceedings on the alleged ground of fraud.

Since City had, as a matter of law, the authority and power to condemn the 24.61 acre tract without also condemning the "Stevens Tract" and the "Scrivener Tract" and having acted within its authorized powers, the fact that it did not condemn the "Stevens Tract" and "Scrivener Tract" can form no basis for fraud against the plaintiffs or the trial court.

PROPOSITION III

Plaintiffs have filed a motion to dismiss and contend that this Court does not have jurisdiction to hear and determine this appeal for the reason the case-made was not served within fifteen (15) days from date of rendition of the final order appealed from and there was no valid and legal order extending such time. In other words, plaintiffs argue there is a fatal gap of time between the order overruling the motion for a new trial and the chain of extension orders extending the time to make and serve case-made.

We find it unnecessary to consider or determine whether the trial court's orders were or were not sufficient to constitute legal extensions of time to make and serve case-made and by such orders a fatal gap of time did or did not exist, for the following reasons.

On August 15, 1963, an order was issued by a Justice of this Court, under the authority of Title 12, O. S. 1961, Sec. 963, retroactively extending the time to make and serve case-made and to file a petition in error and perfect an

appeal to this Court. This order was issued upon application of City after City had filed a similar application with the trial court as provided by Title 12, O.S. 1961, Sec. 1962, and the trial court had refused to retroactively extend such time.

The August 15, 1963, order issued by a Justice of this Court, contained, inter alia, the following:

> "* * * this matter * * * after notice to the adverse parties * * * comes on for hearing * * * the undersigned Justice having heard said application and being fully advised in the premises finds that the time heretofore allowed in which to perfect an appeal has proven insufficient and inadequate and that for good cause shown, said time should be extended in the manner hereinafter set forth and the undersigned Justice further finds that the time in which to make and serve a case made for good cause shown, should be further extended * * *."

Plaintiffs contend that there are two conditions precedent to granting an extension of time retroactively, which are: (1) There must be notice to the adverse party, and (2) there must be evidence introduced at the hearing sufficient to establish good cause for granting an extension.

Plaintiffs do not argue they did not have notice of the proceedings before the Justice but argue that there was no evidence introduced at such hearing sufficient to establish good cause for granting the extension and that the order does not reflect that any evidence was introduced. To sustain their contention that the order did not constitute a legal extension of time, plaintiffs rely upon Kinnison v. State, Okl. Cr., 366 P.2d 969; and Fink v. Fink, 36 OBJ 2253, a Memorandum Decision. By Order of this Court citing with approval the Kinnison case.

In the Kinnison v. State case, supra, the trial court's order granting the extension of time specifically stated that "at such hearing no evidence was adduced by the defendant to show any legal reasons why said extension should be granted; * * *." In the body of the opinion, the Court said, "It is manifestly apparent from the order of the Court that there was no sworn testimony upon which the Court could exercise its discretion, and assuming that the statement of counsel could be treated as evidence it does not sufficiently establish *good cause* for extending time within which to make and serve case-made."

Although plaintiffs had notice of the hearing, they did not attend the proceedings wherein the Justice issued the order under consideration and the record does not contain a transcript of the proceedings. However, the order under consideration specifically states that notice was given, that a hearing was had; and good cause was shown for the extension of time granted.

In Greer v. West, 173 Okl. 427, 48 P.2d 1043, this Court, in considering the statutory provision relating to settlement of disputed facts excluded from the case-made by the trial judge (the same now being Title 12 O.S. 1961, Sec. 965) held that the Supreme Court or any Justice thereof may, upon notice and hearing, settle the facts in dispute and make the order to be included in the case-made, and where the facts in dispute have been so settled by the Chief Justice of this Court, the same will be treated as conclusive.

The order, issued by a Justice of this Court retroactively extending the time to make and serve case-made and within which to perfect an appeal to this Court for good cause shown is conclusive on this Court where the

record discloses that proper notice was given and a hearing was had. Plaintiffs' motion to dismiss is accordingly denied.

CONCLUSIONS

The 1941 condemnation proceedings, insofar as the same relates to the 24.61 acres herein involved, are legal and proper; no fraud was committed by the City or its agents upon plaintiffs or the trial court; and the judgment of the trial court vacating or setting aside the 1941 condemnation proceedings insofar as the 24.61 acres herein involved is erroneous.

The order issued by a Justice of this Court retroactively extending the time for making and serving case-made and the filing of the proceedings in error constitutes a valid and legal extension of such time and this Court has jurisdiction to hear and determine this appeal.

City has raised several contentions concerning why the judgment in the instant action is erroneous. We find it unnecessary to consider them in view of our decision herein.

Judgment reversed with directions to vacate the order overruling motion for new trial and the judgment herein, and enter judgment for City.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

The City of Oklahoma City, a Municipal Corporation, Plaintiff in Error, vs. G. C. Cooper, Bernard Cooper, and Elizabeth Maulding, nee Cooper, Defendants in Error.	No. 40,682

Order Amending Opinion

The opinion heretofore promulgated by this Court on January 25, 1966, in the above entitled and numbered cause is hereby amended in the following particulars, to-wit:

The first three grammatical paragraphs on page 14 of the opinion which begins with the words "Although plaintiffs had notice of the hearing" and ends with the words "Plaintiff's motion to dismiss is accordingly denied," are stricken from the opinion, and the following is inserted in lieu thereof.

In the instant case the order under consideration specifically states that notice was given; that a hearing was had; and that *good cause was shown* for the extension of time granted. It was asserted in motion to dismiss

appeal and is again urged that the Justice's order extending time to appeal does not recite on its face that any evidence was introduced at the hearing and the record does not disclose evidence from which the Justice could have found good cause for extending the time to appeal. It is stated in briefs that no evidence was heard from which the Justice could conclude that good cause was shown for the extension of time to appeal. This is obviously an attempt to impeach the findings of fact of the Justice who entered the order.

In Greer v. West, 173 Okl. 427, 48 P.2d 1043, we held that facts settled by a justice of this Court under the provisions of 12 O.S. 1961, Sec. 965, will be treated by this Court as conclusive.

In the instant case the Justice's order authorizes and invites further consideration by this Court. We have done so and have noticed that the Justice's findings are not impeached by affidavit as is required by Rule 7, of the Supreme Court Rules. 12 O.S. 1961, c.15, Appendix. Carlton v. State Farm Mutual Automobile Ins. Co., Okl., 309 P.2d 286. Under such circumstances it will be presumed the Justice's findings were supported by competent proof; and plaintiff's motion to dismiss is accordingly denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE ON THIS 22 DAY OF MARCH, 1966.

/s/ Harry L. S. Halley,
Chief Justice.

Office-Supreme Court, U.S.
FILED
SEP 16 1966
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 367

G. C. COOPER, BERNARD COOPER, and
ELIZABETH MAULDING, NEE COOPER,
Petitioners,

VERSUS.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES G. HAMILL
309 Municipal Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

September, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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In the
Supreme Court of the United States
OCTOBER TERM, 1966

No. 367

G. C. COOPER, BERNARD COOPER, and
ELIZABETH MAULDING, NEE COOPER,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Trial Court, the District Court of Oklahoma County, Oklahoma, are printed as Appendix A of the Petion and the Requested Findings of Fact and Conclusions of Law submitted by this Respondent to the Trial Court are set forth in Appendix A of this Brief in Opposition. The opinion of the Supreme Court of the State of Oklahoma entered January 25, 1966 is found in Volume 37, Oklahoma Bar Association Journal, pages 257-265 and Ap-

pendix B of the Petition. The Order of the Oklahoma Supreme Court dated March 22, 1966, amending its decision rendered January 25, 1966; is printed as Appendix C of the Petition.

JURISDICTION

This Court does not have jurisdiction since the Petitioners did not present a Federal question in their evidence in the Trial Court, nor in their Answer Brief in the Oklahoma Supreme Court, but presented a Federal question for the first time in their Petition for Rehearing to the Oklahoma Supreme Court. The Judgment of the Oklahoma Supreme Court is on independent, non-Federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the need for taking particular property the extent of taking and the compensation for the taking in a condemnation action to be judged by the conditions existing at the time of taking?

2. When condemnees accept the award of commissioners for their property condemned by a municipality, do they waive the objections to the taking?

3. When condemnees accept the award of commissioners or the jury verdict for damages to their property condemned by a municipality and do not appeal within the time provided by law, do the issues become *res judicata*?

4. Must the petition of a plaintiff seeking to vacate a condemnation proceeding tender a return of the commissioners' award to the condemnee?

5. Must a plaintiff in Oklahoma seeking to vacate a judgment alleging fraud verify his petition as required by 12 O.S. 1961, Section 1033?

6. May a petitioner that does not mention a Federal question in his brief to the Appellate Court raise a Federal question for the first time on Petition for Rehearing?

STATUTES INVOLVED

Oklahoma Statutes, Title 11, Section 293; Title 12, Sections 1031 and 1033 are set forth in Appendix B, Brief in Opposition.

STATEMENT

In this action the Petitioners seek to vacate the final adjudication of condemnation proceedings concerning a portion of the lands owned by them prior to the condemnation in 1941 for reservoir purposes by The City of Oklahoma City. The original action in condemnation was in the District Court of Oklahoma County, State of Oklahoma, Case No. 104206; from which case the Supreme Court of the State of Oklahoma has decided the cases of *Bush* v. *Oklahoma City*, 194 Okla. 504, 154 P.2d 960; *Nichols* v. *Oklahoma City*, 195 Okla. 305, 157 P.2d 174; *Haggard* v. *Oklahoma City*, 203 Okla. 76, 218 P.2d 366; and *Burke* v. *Oklahoma City*, Okla., 350 P.2d 264.

Petitioners filed this action to vacate and set aside the original judgment in the 1941 condemnation action. They alleged extrinsic fundamental fraud in the procurement of said judgment by the Respondent City. This allegation is based upon (1) a Resolution adopted March 22, 1960, by

the Council of The City of Oklahoma City, which declared the two tracts of real estate in the Lake Hefner area owned by the Respondent City to be surplus, not needed for reservoir or other purposes, and that said real estate should be sold; and (2) an "admission" in the testimony of V. V. Long given in the case of *Bush* v. *Oklahoma City, supra.*

The Respondent City resisted this action contending that Petitioners' Petition was fatally defective (1) since it did not contain a verification as required by Statute and failed to state a cause of action against the Respondent City and in favor of the Petitioners; (2) the issues were *res judicata,* having been litigated in 1942; (3) the acceptance of the award of the commissioners constituted a waiver of the Petitioners' rights to object to the taking of their lands in the condemnation proceedings; (4) that the land was needed in 1941 for reservoir purposes; (5) that no fraud of any type or kind was committed by the Respondent City against these Petitioners or the District Court of Oklahoma County, State of Oklahoma.

All the motions, objections and pleadings of the Respondent City were overruled by the Trial Judge, Glen O. Morris, and the case was thereafter tried to the Court without a jury. At the conclusion of the evidence both parties submitted Requested Findings of Fact and Conclusions of Law (Petitioners'—R. Vol. 1, pp. 370-381; Respondent's—R. Vol. 1, pp. 382-393). After having the case under advisement for over six months, the Trial Judge rendered Judgment for the Petitioners, adopting almost verbatim Petitioners' Requested Findings of Fact and Conclusions of Law. See Appendix A of the Petition for the Trial Court's decision.

After the Respondent City's Motion for a New Trial was overruled it appealed to the Oklahoma Supreme Court. In addition to its previous contentions, the Respondent City further contended (1) that the Trial Court erred in adopting Findings of Fact and Conclusions of Law which were contrary to the evidence, not supported by competent evidence, against the weight of the evidence and contrary to law; and (2) that the Trial Court erred in not adopting the Respondent City's Requested Findings of Fact and Conclusions of Law which were supported by competent evidence, the weight of the evidence and supported by law and cited authorities (Appendix A—Brief in Opposition); and (3) that the Trial Court should have rendered judgment for the Respondent City.

Thereafter on January 25, 1966 the Oklahoma Supreme Court, by unanimous decision, reversed the Order of the Trial Court and directed the Trial Court to vacate the Order overruling Respondent City's Motion for New Trial and the Judgment rendered in the Trial Court and further directed that the Trial Court enter Judgment for the Respondent City.

The Supreme Court of the State of Oklahoma, in reversing the Trial Court, found it unnecessary to discuss all the errors of law raised by the Respondent City. Justice Irwin's opinion reversing the Trial Court does not involve Federal questions but discusses two basic fundamental principles of law. First, the principle of *res judicata,* where Petitioners did not challenge the correctness of the proceedings by appeal but accepted and received damages in the amount determined by the commissioners or jury for his or her tract and later attempted to re-open the case,

citing *Henry* v. *United States*, 46 F.2d 640 and 30 C.J.S., Eminent Domain, Sections 327(c) and 328. Secondly, the other proposition in the opinion of Justice Irwin was that the Respondent City was required to prove only a reasonable necessity and not an absolute necessity for the taking of the lands in 1941, under the conditions existing in 1941, citing 11 O.S. 1961, Section 293, enacted in 1923 (App. B—Brief in Oppossition), and *Fischer* v. *Oklahoma City*, 198 Okla. 22, 174 P.2d 244, and that the necessity for taking was adequately proved by the testimony of registered professional engineers.

The Order of the Oklahoma Supreme Court entered March 22, 1966 (Appendix C to Petition) dealt with a procedural matter in Oklahoma Courts and is not raised nor discussed by the Petitioners in their Petition for Writ of Certiorari.

ARGUMENT

This case involves condemnation procedures in the State of Oklahoma and the doctrine of *res judicata*. In the Trial Court and on appeal to the Oklahoma Supreme Court the Petitioners relied exclusively on local law until the Oklahoma Supreme Court ruled adversely to their contentions and then on Petition for Rehearing the Petitioners tardily alleged a Federal question.

No Federal question is involved since there is no allegation that the provisions of the Oklahoma Constitution relating to condemnation actions are contrary to or in any manner contravene the United States Constitution. Petitioners were represented by counsel at all stages of the original condemnation proceedings, which began in 1941.

The issues pertaining to the necessity of the taking, extent of the taking, public use and compensation for the lands condemned by The City of Oklahoma City were all litigated, the decisions became final and Petitioners did not appeal.

Later, in 1960 Petitioners instituted this action seeking to overturn the existing Oklahoma law pertaining to condemnation and in total disregard of the principle of *res judicata.*

Although the Trial Court ruled in favor of Petitioners, the Oklahoma Supreme Court unanimously reversed the Trial Court and directed that Judgment be entered for the Respondent, The City of Oklahoma City, deciding the case entirely on local law and without reference to any Federal question. In its decision the Oklahoma Supreme Court found it unnecessary to consider all the allegations of error raised by the Respondent City and decided the case basically on the doctrine of *res judicata.*

The principles involved do not present any question for this Court.

I.

There Is No Important Question of Federal Law.

Petitioners in the Answer Brief before the Oklahoma Supreme Court urged provisions of the Oklahoma Constitution pertaining to condemnation of property; however, they did not contend that these provisions of the Oklahoma Constitution were contrary to or in conflict with similar provisions of the United States Constitution.

This case was litigated and decided entirely on local law, without reference to rights claimed under the Constitution of the United States.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway Company*, 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510:

> "1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U.S. Const., 14 Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law."

Southwestern Bell Telephone Company v. *State of Oklahoma*, 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528:

> "2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419:

> "A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

Hooker v. *City of Los Angeles*, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395:

> "2. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.
>
> "3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

II.

Petitioners Have Waived Their Right to Urge a Federal Question.

In the Trial Court the Petitioners presented their case on the theory of extrinsic constructive fraud. The Amended Petition (R. Vol. 1, p. 35), mentions the United States Constitution without specific reference to any Article or Section. At the conclusion of the trial, both parties submitted Requested Findings of Fact and Conclusions of Law; Petitioners' (R. Vol. 1, pp. 370-381) and Respondent's in Appendix A, Brief in Opposition and (R. Vol. 1, pp. 382-393).

The Requested Findings of Fact and Conclusions of Law submitted by Petitioners did not include any Federal question. Likewise, the Trial Court's Findings of Fact and Conclusions of Law (R. Vol. 1, pp. 396-411; Appendix A of Petition) did not decide a Federal question but decided the case on the theory of extrinsic constructive fraud.

In their Answer Brief in the Oklahoma Supreme Court (See Answer Brief Index i-iii) the Petitioners relied on the Oklahoma Constitution and not on any Federal question or the United States Constitution.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Crowell v. Randell, 10 Pet. 368, 398, 9 L.ed. 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed. 535, 6 Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed. 847, 850, 22 Sup. Ct. Rep. 605."

Beck v. *Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, Con. Law, Section 115, states in part: -

"* * * An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. * * *"

The opinion of Justice Irwin for the Oklahoma Supreme Court, as amended (Appendix B and C of Petition), decided the case on adequate non-Federal grounds; namely, *res judicata* and that the Respondent City had proved a reasonable necessity for the taking of the land. The first discussion by Petitioners of the United States Constitution or a Federal question was in their Petition for Rehearing and Brief in Support thereof.

St. Louis & San Francisco Railroad Company v. *Shepherd*, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274, holds:

"1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Bilby v. *Stewart*, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264, states:

"Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court."

The Oklahoma Supreme Court denied the Petition for Rehearing without deciding the tardily alleged Federal questions. See Orders of the Oklahoma Supreme Court dated March 22, 1966 denying the Petition for Rehearing and amending its decision rendered on January 25, 1966 and Order dated April 19, 1966, denying the Second Petition for Rehearing; therefore, Petitioners are precluded from urging a Federal question.

III.

The Decision Is Clearly Correct.

The Oklahoma Supreme Court thoroughly searched the record and at 37 O.B.A.J. 260 (Appendix B, p. A 22, Petition) stated:

> "The original condemnation proceedings were commenced on July 24, 1941, and the record discloses that on August 26, 1941, each of the plaintiffs herein filed an answer specifically denying that it was necessary for City to take and appropriate his or her particular tract for reservoir purposes. On October 9, 1941, the Commissioners filed their report of their report of their appraisal and on October 17, 1941, each of plaintiffs filed a demand for a jury trial. Without setting forth other details of the proceedings, it is sufficient to say that each plaintiff did not challenge the correctness of the proceedings by appeal but accepted and received damages in the amount determined by the Commissioners or the jury for his or her separate tract."

Pleadings in the original condemnation, including Answer of the three Petitioners (R. Vol. 2, pp. 120-135), their three Demands and two Withdrawals of Demands for Jury Trial (R. Vol. 2, pp. 136-146), Applications and Orders for payment of compensation awarded by commissioners

(R. Vol. 2, pp. 154-170), and the Journal Entries of Judgment (R. Vol. 2, pp. 180-189) clearly reveal that all issues, including the issue of necessity, were litigated.

27 Am.Jur.2d, Eminent Domain, Section 468, provides in part:

> "* * * The rule that a party who has voluntarily accepted the benefits of a judgment order, or decree cannot thereafter institute appeal or error proceedings to reverse it, in general applies in appeals from condemnation proceedings both as to the condemnor and the landowner. * * *"

Winslow v. *Baltimore & Ohio Railroad Company,* 208 U.S. 59, 52 L.Ed. 388, 28 S.Ct. 190:

> "1. By accepting the sum awarded in condemnation proceedings as the value of that portion of their lands actually taken, the owners are estopped to insist that the petition was not maintainable."

Henry v. *United States,* 46 F.2d 640:

> "Property owner accepting award for taking property under eminent domain cannot raise question of validity of proceedings or taking."

The 1941 Resolution of Necessity (R. Vol. 2, pp. 74-83), pursuant to Statute, 11 O.S. 293 (App. B—Brief in Opposition) included Petitioners' lands and this Resolution of Necessity was approved by the Oklahoma Supreme Court in *Bush* v. *Oklahoma City,* 194 Okla. 504, 154 P.2d 960. Instructions of the Trial Court in 1942 (R. Vol. 2, pp. 171-172), Order of the Trial Court (R. Vol. 2, p. 184), and Journal Entry of Judgment (R. Vol. 2, pp. 187-189), reveal that The City of Oklahoma City proved necessity and was entitled to the fee simple title to the lands.

The necessity of the taking of these lands by The City of Oklahoma City was again proved in the 1962 testimony of Frank Herrman (R. Vol. 1, pp. 248-263), Frank S. Taylor (R. Vol. 1, pp. 263-276), and S. Karl Bean (R. Vol. 1, pp. 289-324), all registered professional engineers. These witnesses also testified concerning the construction of a sanitary diversion ditch around the south shore of Lake Hefner to divert the polluted waters draining from the south (including the former lands of the Petitioners) around the lake. This project, requested by the Health Department of the State of Oklahoma, was commenced by the Respondent City in 1957 and completed in 1959. The completion of this project changed the high-water line and the 660-foot line which had existed since 1941.

Petitioners presented no expert testimony that these lands were not necessary for the uses and purposes for which condemned.

Thus, the issues were litigated, not appealed, and became *res judicata*. The Oklahoma Supreme Court (37 O.B.A.J. 260, Appendix B, p. A 233, Petition) in its opinion stated:

> "The principle of res judicata is applicable in condemnation cases. In accordance with the principles governing the doctrine of res judicata with respect to judgments generally, * * * where an award or judgment is regularly made, and, as held by some authorities, is not appealed from, the rights of the respective parties become definitely fixed thereby, and it is conclusively binding on all the parties of record and likewise, on their privies and grantees. * * *"

IV.

There Is No Conflict of Decision.

On page 17 of the Petition the proposition is urged that the holding of the Oklahoma Supreme Court in the instant case is in conflict with cases of this Court in which certiorari has been granted to review actions by former landowners seeking to vacate condemnation actions, citing *Huling* v. *Kaw Valley Railway & Improvement Company,* 130 U.S. 559, 32 L.Ed. 1045, 9 S.Ct. 603, and *Goodrich* v. *Detroit,* 184 U.S. 432, 46 L.Ed. 627, 22 S.Ct. 397.

Clearly these cases are distinguishable. In *Huling* v. *Kaw Valley Railway & Improvement Company, supra,* the issue involved was, did notice by publication to a non-resident property owner comply with the requirements of due process of law; while *Goodrich* v. *Detroit, supra,* was not a condemnation action but a suit to enjoin collection of assessments for benefits from a street improvement.

Two other cases cited by Petitioners, *Escobedo* v. *Illinois* (erroneously cited as *Escobedo* v. *United States*), 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758, and *Shepperd* v. *Maxwell,* — U.S. —, 16 L.Ed.2d 600, 86 S.Ct. —, both involved constitutional rights of citizens charged and subsequently convicted of crimes and relate in no possible way to the rights of these Petitioners.

Several cases are cited by Petitioners stating that the nature of use in a condemnation action is a judicial question. The necessity and extent of taking the land involved herein, for the uses and purposes set forth in the Resolution of Necessity (R. Vol. 2, pp. 74-83), was litigated and decided in favor of the Respondent City in the early 1940's,

and re-affirmed by the Oklahoma Supreme Court in its opinion dated January 25, 1966 and published as Appendix B of the Petition. This decision re-affirmed previous decisions and law in the State of Oklahoma pertaining to condemnation, namely: *Fischer* v. *Oklahoma City,* 198 Okla. 22, 174 P.2d 244, and *Graham* v. *City of Duncan,* Okla., 354 P.2d 458:

> "The need for taking the particular property and the extent of the taking are to be judged by the conditions existing at the time of taking."

White v. *City of Pawhuska,* 130 Okla. 156, 265 Pac. 1059:

> "The word 'necessity' in connection with condemnation proceedings does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expenses to the condemning party and property owners consistent with such benefit."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JAMES G. HAMILL
309 Municipal Building
Oklahoma City, Oklahoma 73102
Counsel for Respondent

September, 1966

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA.

G. C. Cooper, et al, Plaintiffs,	)	
vs.	)	No. 149,524
The City of Oklahoma City, a municipal corporation, Defendant.	)	

REGUESTED FINIDNGS OF FACT AND CONCLUSIONS OF LAW OF THE DEFENDANT

Comes now the above named defendant and moves the Court to make the following Findings of Fact and Conclusions of law herein.

ROY H. SEMTNER
Municipal Counselor
By /s/ Charles E. Chilton
Charles E. Chilton
/s/ James G. Hamill
James G. Hamill

Assistant Municipal Counselors
Attorneys for Defendant
The City of Oklahoma City

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Facts herein.

1.

That on July 15, 1941 the City Council of Oklahoma City adopted a resolution declaring the necessity for acquiring, owning, improving, maintaining and beautifying

certain real property for reservoir purposes; instructing the City Manager to acquire fee simple title thereto under the power of eminent domain, said resolution pertaining to and including real estate of the plaintiffs herein, further identified as Tracts 8, 9, and 12.

2.

That on July 24, 1941 the City of Oklahoma City, by and through its Municipal Counselor, filed a petition in the District Court of Oklahoma County, Case No. 104026, entitled "The City of Oklahoma City vs. Mevon Corporation, et al.," to acquire by eminent domain a fee simple title in the real property described in the resolution of July 15, 1941.

3.

That on August 20, 1941 the Court appointed commissioners to appraise the lands involved in Case No. 104,026, including real estate owned by the plaintiffs herein.

4.

That on August 26, 1941, the plaintiffs herein, and each of them, filed their answers to the petition in Case No. 104,026. A true copy of the answer of Bernard Cooper is attached herewith, marked "Attachment A." The answers of Green C. Cooper and Elizabeth Maulding, nee Cooper, contained the identical allegations of the answer of Bernard Coopers; namely, denying that their real estate was needed by the City for the construction of a water reservoir.

5.

That on October 9, 1941 the commisisoners filed their report including appraisals of the real estate owned by the plaintiffs herein, said report being as follows:

Green C. Cooper	Tract. No. 8	$7,000.00
Bernard Cooper	Tract No. 9	$5,500.00
Elizabeth Maulding, nee Cooper	Tract No. 12	$2,641.00

6.

That on October 17, 1941 plaintiffs herein filed their demand for a jury trial for assessment of damages.

7.

That on November 8, 1941 The City of Oklahoma City filed a demand for jury trial for assessment of damages to Tracts 8, 9 and 12 owned by plaintiffs herein.

8.

That on January 16, 1942 Green C. Cooper applied to the Court for payment of compensation awarded by commissioners on Tract 8.

9.

That on January 26, 1942 the Court entered an order to pay compensation awarded by commissioners to Green C. Cooper in the amount of $5,455.00 and to J. D. Thompson, lienholder $1,545.00 pursuant to the application of Green C. Cooper and that said amounts were paid by the City and received by the parties.

10.

That on March 9, 1942 Bernard Cooper and Elizabeth Maulding, nee Cooper, applied to the Court for payment of compensation awarded by commissioners; said applications being approved by the Court on March 9, 1942; order of the Court entered therein for payment of compensation awarded by commissioners to Bernard Cooper in the amount of $5,052.26 and lienholder M. D. Cochran $447.74 for Tract No. 9; and to Elizabeth Maulding, nee Cooper, $2,193.26 and lienholder M. D. Cochran $447.74 for Tract No. 12, said sums being paid by the City and received by the aforementioned parties.

11.

(a) That on October 5, 1942 the case of Green C. Cooper (Tract 8) was tried to a jury.

(b) That the Court instructed the jury that The City of Oklahoma City would receive a fee simple title to said tract, Instruction No. 1, given by District Judge Lucius Babcock, reads, in part, as follows:

"GENTLEMEN OF THE JURY:

"1st This is an action resulting from a proceeding brought in this court in which the City of Oklahoma City, a Municipal Corporation, has condemned a certain tract of land for the purpose of constructing a water reservoir thereon and it appears that the proceeding has extended to the point where the land has been condemned and the project located upon the lands of Green C. Cooper, he being the party having demanded a jury trial, and it is now your duty to determine the fair, cash market value of the fee simple title to the tract of land involved which value is to be determined as of October 14, 1941, Said tract of land is described as follows:"

(c) That the jury awarded the sum of $5,650.00 to Green C. Cooper, which was $1,350.00 less than the commissioners' award on Tract 8, and withdrawn by said Green C. Cooper pursuant to the order of the Court rendered on January 26, 1942. A true copy of the Journal Entry pertaining to Tract 8 is herewith attached, marked "Attachment B."

(d) That on October 7, 1942, a motion for new trial was filed by Green C. Cooper; said motion was overruled on November 6, 1942 and no appeal was taken from the ruling of the Court.

12.

That on October 12, 1942 Elizabeth Maulding, nee Cooper (Tract 12), and The City of Oklahoma City both withdrew their demands for a trial by jury; the District Court approved the award of commissioners and ordered that said award be sustained as the final judgment insofar as Tract 12 was concerned and no appeal was taken therefrom by either party. A true copy of said order is herewith attached, marked "Attachment C."

13.

That on October 25, 1946 the City withdrew its demand for a jury trial on Tract 9 and Bernard Cooper withdrew his demand for a jury trial on the aforementioned Tract on October 28, 1946.

14.

That on November 12, 1946 the District Court found that Bernard Cooper had withdrawn his objections to the report of the commissioners; that the taking and condemnation of Tract 9 was necessary; report of commissioners confirmed and fee simple absolute title vested in The City of Oklahoma City. No appeal was taken therefrom by either party. A true copy of the Journal Entry is herewith attached, marked "Attachment D."

15.

That the overwhelming majority, if not all, of Tracts 8, 9, and 12, and each of them, and more specifically the 24.61 acres, more or less, in litigation herein, were within 660 feet of the high water mark of the proposed Bluff Creek Reservoir when condemnation proceedings were instituted in 1941.

16.

That the issue of necessity of the taking by condemnation by The City of Oklahoma City of Tracts 8, 9 and 12

was presented to the District Court of Oklahoma County, and said issue was found in favor of The City of Oklahoma City. No appeal therefrom was taken by the condemnees.

17.

(a) That in 1941 The City of Oklahoma City, by and through its agents, servants and employees, entered into visible, open, continuous and exclusive possession of Tracts 8, 9 and 12 with a claim of ownership in fee simple.

(b) That since entering into possession in 1941, Tracts 8, 9 and 12 have been used by The City of Oklahoma City for public purposes in connection with the Bluff Creek Reservoir, now known as Lake Hefner.

(c) That The City of Oklahoma City has remained in visible, open, continuous and exclusive possesison with a claim of ownership in fee simple in Tracts 8, 9 and 12 from 1941 through the present time.

18.

That the plaintiffs in this action, Green C. Cooper, Bernard Cooper and Elizabeth Maulding, nee Cooper, former owners of Tracts 8, 9 and 12, and The City of Oklahoma City were adversary litigants in District Court of Oklahoma County, Case No. 104,026, involving condemnation by The City of Oklahoma City of the aforementioned tracts.

19.

That plaintiffs herein, Bernard C. Cooper and Elizabeth Maulding, nee Cooper claimed that in 1941 they knew their real estate, Tracts 9 and 12, were not needed and would never be used for reservoir purposes by The City of Oklahoma City.

20.

That the City Council of The City of Oklahoma City in 1941 was presented engineering reports, maps, charts and other technical information showing a necessity for the acquiring of Tracts 8, 9 and 12 for reservoir purposes prior to the enactment of the resolution of necessity on July 15, 1941.

21.

That the plaintiffs herein, Green C. Cooper, Bernard Cooper and Elizabeth Maulding, nee Cooper, have offered no evidence showing, tending to show, or inferring fraud of any kind or nature committed by any City Councilman of The City of Oklahoma City, or any other employee or agent of Oklahoma City, against the plaintiffs herein or the Court.

22.

That the allegations of the petition of the plaintiffs herein did not contain a tender to return the purchase price, or proportionate share thereof, paid by The City of Oklahoma City to the plaintiffs herein in 1942 for Tracts 8, 9 and 12, and said petition did not contain a verification by the plaintiffs or their attorneys.

CONCLUSIONS OF LAW

1.

The adoption of the resolution of necessity by the Oklahoma City Council on July 15, 1941 was a legislative act. *City of Tulsa* v. *Williams,* 227 P. 876, *Grand River Dam Authority* v. *Thompson,* 113 P.2d 818, syllabus 2.

2.

The introduction in evidence of the resolution of necessity by the Municipal Authority established a prima

facie case of necessity, whereupon the burden to proceed with evidence shifted to the condemnees. *Bush* v. *Oklahoma City,* 154 P.2d 960, Syllabus 1; *Delfeld* v. *City of Tulsa,* 131 P.2d 754.

3.

When the condemnees withdrew their objections to the taking and joined issue on the value of the fee simple title sought, condemnees waived objections and cannot thereafter raise any issue in an effort to recover the real estate. *Winslow* v. *Baltimore & Ohio Railroad,* 208 U.S. 59, *Fischer* v. *Oklahoma City,* 174 P.2d 244, syllabus 3; *Seba* v. *Independent School District No. 3,* 253 P.2d 559; *Henry* v. *U. S.,* 46 F.2d 640.

4.

It is within the proper province of the legislature to enact laws which will enable municipalities to acquire a fee simple title in real estate by exercising the power of eminent domain. *Ramsey* v. *Leeper,* 31 P.2d 852, syllabus 3.

5.

Where title of legislative act, House Bill No. 309, Session Laws 1923 (11 O.S. 1961, Sec. 293), states its purpose as authorizing municipal corporations "to purchase or condemn and hold lots and lands in fee simple for waterworks purposes," language in body of act authorizing any municipal corporation "to purchase or condemn and hold the perpetual right to use any lots or lands" for such purposes authorizes and imports the condemnation of the fee simple title to such lands. *Springfield* v. *City of Perry,* 358 P.2d 846, syllabus 3.

6.

The need for taking the particular property and the extent of the taking and the compensation for the taking

are to be judged by the conditions existing at the time of taking. *Fischer* v. *Okla. City*, [illegible].2d 244; *Graham* v. *City of Duncan*, 354 P.2d 458.

7.

The necessity, utility or expediency of the exercise of the right of eminent domain are questions for legislative determination, and the Courts have no power to interfere with the reasonable exercise thereof; but when the question is raised as to the necessity for taking any particular piece of property for the public use, such question presents matter for judicial determination, *Grand River Dam Authority* v. *Thompson*, 113 P.2d 818, syllabus 3.

8.

A municipality condemning land for reservoir purposes under the authority of 11 O.S. 1961, Sec. 293 is not required to show an aboslute necessity, but only a reasonable present necessity for the taking of particular land, *Bush* v. *Oklahoma City*, 154 P.2d 960.

9.

The issue of necessity was raised by the condemnees and determined in favor of the condemnor, The City of Oklahoma City in Case No. 104,026, District Court of Oklahoma County.

10.

When the condemnees failed to appeal within the time allowed by statute, the determination of the issue of necessity and the judgment in favor of The City of Oklahoma City became conclusive, not only as to all the matters litigated and determined, but also as to all matters germane to the issue which could or might have been litigated herein. *Pruitt* v. *Hammers*, 292 P.2d 157, syllabus 3.

11.

The City of Oklahoma City has been in possession of Tracts 8, 9 and 12 for sufficient length of time to acquire title by prescription under the authority of 12 O.S. 1961, Sec. 93, paragraph 4.

12.

There is no evidence of any type of fraud committed by the City Council of Oklahoma City in 1941, 1960 or 1962, or by any agent or employee of said City, against the Court of plaintiffs herein.

13.

The petition of the plaintiffs herein is fatally defective since its allegations did not contain a tender to return to The City of Oklahoma City the purchase price, or proportionate share thereof, paid by The City of Oklahoma City in 1942 to plaintiffs herein for Tracts 8, 9 and 12 and for the further reason that plaintiffs' petition was not verified, as required by law. *Henry* v. *United States,* 46 F.2d 640; *Scott* v. *Bailey,* 169 P.2d 208; *Allan* v. *Garson,* 189 P. 183, 12 O.S. 1961, Sections 1031, subd. 4, 1033.

Judge of the District Court

(Attached to the foregoing Suggested Findings of fact and Conclusions of Law, as "Attachment A" thereof, appears the "Answer of the Defendant Bernard Cooper" filed in case No. 104026, which is set out at page numbered 129 in the volume of this case-made labeled "EXHIBITS" and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment B" thereof, is a JOURNAL ENTRY OF JUDGMENT in case No. 104026, which is set out at page numbered 180 of the "EXHIBITS" volume of this case-made and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment C" thereof, is an "ORDER," filed in said case No. 104026, which is set out in the "EXHIBITS" volume of this case-made at page numbered 184 thereof, and for that reason is not recopied here.)

(Also attached to said instrument as "Attachment D" thereof, is a "JOURNAL ENTRY," filed in case No. 104026, which is set out in the "EXHIBITS" volume of this case-made at page numbered 187 thereof, and for that reason is not recopied here.)

APPENDIX B

OKLAHOMA STATUTES, 1961, Title 11, Section 293:

§ 293. Purchase or condemnation of land for waterworks—Protection from contamination or pollution.—Any municipal corporation within this State, may purchase or condemn and hold the perpetual right to use any lots or lands, either within or without the corporate limits of such municipal corporation, which the governing body of such municipal corporation shall determine by resolution to be necessary to be acquired by such municipal corporation for the location and building or enlargment at the time or in the future, of waterworks plant or plants, and every auxiliary part thereof, including reservoir site or sites to be flooded, and the lands adjacent thereto, and within six hundred and sixty feet of the margin of said reservoir at maximum high water; and also any lands which the governing body of such municipal corporation shall, by resolution, determine to be necessary to be acquired for the purpose of protecting any reservoir already constructed, or proposed to be constructed or enlarged, as a part of any such municpal waterworks plant or water supply, and the waters thereof, and the waters flowing therein or percolating or seeping thereto from possible contamination or pollution and policing the same; and such municipal corporation is hereby invested with the power of eminent domain for the purpose of acquiring any such lands; and the proceedings for the condemnation thereof, including the notices, appointment of commissioners, assessment of damages, possession, payment of compensation and appeals, shall be the same as is provided by law for the condemnation of lands for railroad purposes, provided, however, it shall not be necessary in proceedings to condemn, under this Act,[1] to allege or prove any negotiations for the purchase of any lands or interests therein, with the owner or owners or claimants of any property sought to be condemned, where such ownership does not appear clearly from the title records in the office of the

County Clerk of the County where such lots or lands are situate, or where the present owners are heirs of the person or persons who appear from such records to be the owner or owners, or hold or claim under such heirs, and the lands have not been partitioned, at the time the petion to condemn is filed; and provided, further, the notice of application for appointment of commisisoners to assess damages in condemnation proceedings may, in all cases mentioned in the first proviso hereof, be given by publication, as provided by law for notice to non-residents, in the law regulating the condemnation of lands for railroad purposes. That the property and land acquired as herein provided, and all lands previously acquired and hereafter acquired, insofar as the same are within Six Hundred Sixty (660) feet of the margin of such reservoir, at maximum high water, except such or any part of such lands, the natural drainage of which is not into such reservoir, shall not be used by such municipal corporation, its lessees or assigns, or other persons or corporation, for any purpose other than the protection of such reservoir, and the waters thereof, from contamination and pollution, and no structure shall be placed thereon by any such municipality, individual or corporation, except such as are necessary in the furtherance of the protection of such reservoir from contamination or pollution, and in the use of such water. This Act shall be construed as cumulative to the rights and powers already possessed by municipal corporations to purchase, take and condemn land for public uses. Laws 1923, ch. 204, p. 355, § 1.

TITLE 12, SECTION 1031

§ 1031. District court, power to vacate or modify its judgments, when.—The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made:

First. By granting a new trial for the cause within the time and in the manner prescribed in Section 5035.[1]

Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in Section 4728.[2]

Third. For mistake, neglect or omisison of the clerk, or irregularity in obtaining a judgment or order.

Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order.

Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings.

Sixth. For the death of one of the parties before the judgment in the action.

Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in Section 5142.[3]

Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment. R.L. 1910, § 5267.

TITLE 12, SECTION 1033

§ 1033. Proceedings by petition, when—Summons.—The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine of the second preceding section,[1] shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action. R.L. 1910, § 5269.